Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

HOME INSURANCE COMPANY,
Defendant,

INSURANCE COMPANY OF NORTH AMERICA,
CIGNA CORPORATION, AND CIGNA
INTERNATIONAL CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a reinsurer that has agreed to assume an insurer's obligations to an insured, can destroy the privity thereby created between the insured and reinsurer by including a third-party disclaimer clause in the assumption reinsurance agreement.

PARTIES TO THE PROCEEDING

The parties to this proceedings are set forth in the caption. The parent companies and non-wholly owned subsidiaries of Petitioner Nationwide Mutual Insurance Company are:

Affiliate Agency, Inc.
Affiliate Agency of Ohio, Inc.
Allnations, Inc.
American Marine Underwriters, Inc.
Auto Direkt Insurance Company
California Cash Management Company
Colonial County Mutual Insurance Company
Colonial Insurance Company of California (Colonial)
Columbus Insurance Brokerage And Service GmbH
Companies Agency, Inc.
Companies Agency Insurance Services of California
Companies Agency of Alabama, Inc.
Companies Agency of Idaho, Inc.
Companies Agency of Illinois, Inc.
Companies Agency of Kentucky, Inc.
Companies Agency of Massachusetts, Inc.
Companies Agency of New York, Inc.
Companies Agency of Pennsylvania, Inc.
Companies Agency of Phoenix, Inc.
Companies Agency of Texas, Inc.
Companies Annuity Agency of Texas, Inc.
Countrywide Services Corporation
Employers Insurance Of Wausau, A Mutual Company
Employers Life Insurance Co. Of Wausau
F & B, Inc.
Farmland Mutual Insurance Company

Financial Horizons Distributors Agency of Alabama, Inc.
Financial Horizons Distributors Agency of Ohio, Inc.
Financial Horizons Distributors Agency of Oklahoma, Inc.
Financial Horizons Distributors Agency of Texas, Inc.
Financial Horizons Investment Trust
Financial Horizons Securities Corp.
Gates, McDonald & Company
Gates, McDonald & Company of Nevada
Gates, McDonald & Company of New York, Inc.
Gates, McDonald Health Plus, Inc.
Greater la Crosse Health Plans, Inc.
Insurance Intermediaries, Inc.
Key Health Plan, Inc.
Landmark Financial Services of New York, Inc.
Leben Direkt Insurance Company
Lone Star General Agency, Inc.
MRM Investments, Inc.
National Casualty Company
National Premium & Benefit Administration Company
Nationwide Investing Foundation
Nationwide Community Urban Redevelopment Corporation
Nationwide Properties, Ltd.
Nationwide Realty Investors, Ltd.
Nationwide Life and Annuity Insurance Company
Nationwide Cash Management Company
Nationwide Investment Services Corporation
Nationwide Mutual Fire Insurance Company
Nationwide Communications, Inc.
Nationwide Corporation
Nationwide Investing Foundation II

Nationwide Insurance Golf Charities, Inc.
Nationwide Insurance Enterprise Foundation
Nationwide Development Company
Nationwide Investors Services, Inc.
Nationwide Advisory Services, Inc.
Nationwide Agency, Inc.
Nationwide Separate Account Trust
Nationwide Indemnity Company
Nationwide Property and Casualty Insurance Company
Nationwide Management Systems, Inc.
Nationwide Financial Institution Distributors Agency, Inc.
Nationwide Financial Services, Inc.
Nationwide Financial Services Capital Trust
Nationwide HMO, Inc.
Nationwide Lloyds
Nationwide Life Insurance Company
Nationwide General Insurance Company
Nationwide Agribusiness Insurance Company
NCC of America, Inc.
NEA Valuebuilder Investor Services, Inc.
NEA Valuebuilder Investor Services Insurance Agency, Inc.
NEA Valuebuilder Investor Services of Ohio, Inc.
NEA Valuebuilder Investor Services of Oklahoma, Inc.
NEA Valuebuilder Investor Services of Texas, Inc.
NEA Valuebuilder Investor Services of Alabama, Inc.
NEA Valuebuilder Investor Services of Arizona, Inc.
NEA Valuebuilder Investor Services of Wyoming, Inc.
NEA Valuebuilder Investor Services of Nevada, Inc.
NEA Valuebuilder Investor Services of Montana, Inc.
Neckura Insurance Company
Neckura Holding Company (Neckura)

Neckura Life Insurance Company
Neckura General Insurance Company
NWE, Inc.
Pebsco of Texas, Inc.
Pebsco of Alabama
Pebsco of Arkansas
Pebsco of Massachusetts Insurance Agency, Inc.
Pebsco of Montana
Pebsco of New Mexico
Pension Associates Of Wausau, Inc.
Physicians Plus Insurance Corporation
Prevea Health Insurance Plan, Inc.
Public Employees Benefit Services Corporation
San Diego Lotus Corporation
Scottsdale Insurance Company (SIC)
Scottsdale Indemnity Company
Scottsdale Surplus Lines Insurance Company
SVM Sales GmbH
The Beak and Wire Corporation
Wausau Business Insurance Company
Wausau Underwriters Insurance Company
Wausau Insurance Co. (U.K.) Limited
Wausau Preferred Health Insurance Co.
Wausau (Bermuda) LTD.
Wausau Service Corporation
Wausau General Insurance Company
Wausau International Underwriters

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Irene C. Keyse-Walker and Michael L. Cohen, attorneys for Nationwide Mutual Insurance Company, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 6, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 150 F.3d 545 (1998) and is attached at Appendix, p. A1.

The opinion of the United States District Court for the Southern District of Ohio was entered on March 25, 1997 and is attached hereto at Appendix, p. A15.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on August 6, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

None.

STATEMENT OF THE CASE

Petitioner Nationwide Mutual Insurance Company ("Nationwide") filed this lawsuit for damages and declaratory relief, when it ceased to receive the benefit of the bargain it had made to cut off its continuing liabilities for certain insurance losses arising out policies issued in the 1960's. It sued Home Insurance Company ("Home"), which had assumed the Nationwide liabilities at issue in 1977, through an assumption reinsurance agreement (the "Nationwide/Home Agreement"). It also sued INA Corporation (subsequently dismissed by joint motion), and Respondents Insurance Company of North America ("INA"), CIGNA Corporation, and CIGNA International Corporation (collectively "CIGNA defendants"), which had purchased a portion of the Home insurance business in 1983. The transaction (the "Home/CIGNA defendants Agreement"), included an assumption reinsurance agreement (the "Assumption Agreement"), under which the CIGNA defendants agreed to assume Home's obligations under the Nationwide/Home Agreement.

The United States District Court for the Southern District of Ohio first stayed Nationwide's claims against Home, and ordered those parties to arbitration, pursuant to an arbitration clause in the Nationwide/Home Agreement. The CIGNA defendants then moved for summary judgment, claiming that Nationwide could not assert a direct cause of action against them.

Nationwide countered that it had sufficient privity to sue the CIGNA defendants under either of two theories: 1) as a result of the CIGNA defendants' assumption of Home's liabilities, including the

Nationwide/Home Agreement, the CIGNA defendants "stepped into the shoes" of Home and were directly liable to Nationwide for breaches of the Nationwide/Home Agreement; and 2) because the Nationwide/Home Agreement was one of the obligations assumed by the CIGNA defendants under the terms of the Assumption Agreement, Nationwide was an intended third-party beneficiary of the Assumption Agreement, with a right to sue for breaches of the assumed obligations. At a minimum, Nationwide noted, the District Court should permit it to conduct discovery on the issue of the intent of the parties to the Assumption Agreement before granting summary judgment in favor of the CIGNA defendants.

The District Court agreed with Nationwide's first argument, rejected its alternative argument, and ordered the CIGNA defendants to join in the Nationwide/Home arbitration previously ordered. The District Court held that the CIGNA defendants "stood in the shoes" of Home, by virtue of their assumption of Home's obligations to Nationwide, and therefore had a direct obligation to Nationwide under the Nationwide/Home Agreement that Nationwide could enforce. But the District Court agreed with the CIGNA defendants that a third-party disclaimer clause in the Home/CIGNA defendants Agreement precluded Nationwide's alternative argument that its status as an intended third-party beneficiary of that Agreement gave it the right to sue the CIGNA defendants directly.

The CIGNA defendants appealed, arguing that as a matter of "basic Aristotelian logic," if Nationwide were not an intended third-party beneficiary of the

Assumption Agreement, it could not sue the CIGNA defendants for breaches of the Nationwide/Home Agreement. Nationwide cross-appealed, arguing that the District Court correctly held that the CIGNA defendants "stood in the shoes" of Home in the Nationwide/Home Agreement, and could be sued, along with Home, for breaches of that Agreement, but that Nationwide's alternative basis for a direct suit – third-party beneficiary status under the Assumption Agreement – was also viable. Nationwide reiterated that it was at least entitled to discovery on the issue of the parties' intent before summary judgment could be entered in favor of the CIGNA defendants.

The Sixth Circuit reversed, holding that the third-party disclaimer clause in the Assumption Agreement precluded a direct action by Nationwide against the CIGNA defendants. It rejected Nationwide's cross-appeal, and failed to address Nationwide's alternative request for additional discovery:

> The claims against the CIGNA defendants cannot be submitted to arbitration because the express disclaimer in the Assumption Agreement prevents Nationwide from suing the CIGNA defendants to enforce the reinsurance obligations the CIGNA defendants assumed from Home. We remand the case to the District Court to enter an order dismissing Nationwide's claims against the CIGNA defendants.

150 F.3d at 549. Thus, while recognizing that the CIGNA defendants assumed Home's reinsurance obligations to Nationwide, the Court refused to allow

Nationwide to enforce those obligations against the CIGNA defendants.

A. The Nationwide/Home Agreement.

In the early 1960's, Nationwide decided to participate in a reinsurance pool managed and administered in London by M.E. Rutty Underwriting Agency, Ltd. (the "Rutty Pool"). Rutty had the authority to reinsure various international risks, and assign fixed percentages of the risks underwritten to each of the Pool participants.

Although it withdrew from the Rutty Pool at the end of the 1966 underwriting year, Nationwide had continuing obligations to the cedents that purchased reinsurance during the years of Nationwide's participation. In the 1970's, Nationwide decided to withdraw from the London market altogether, and sought to find a company that would assume its Rutty Pool obligations. Home (acting as the issuing carrier for an unincorporated association of insurers known as AFIA), agreed to assume the Rutty Pool obligations. It entered into the Nationwide/Home Agreement (entitled "Reinsurance Contract No. R"), on April 15, 1977. Home and Rutty agreed that they would thereafter deal exclusively with each other until all Rutty Pool claims had been paid.

B. The Home/CIGNA Defendants Agreement.

In 1983, CIGNA purchased AFIA's operations, including all of its assets, liabilities, and contingent liabilities. The documents consummating the purchase included "Purchase Agreement No. 1," "Insurance and

Reinsurance Assumption Agreement," and "Quota Share Reinsurance Treaty Agreement". The Assumption Agreement required a CIGNA entity (INA) to assume all of the AFIA members' insurance and reinsurance liabilities. CIGNA guaranteed the obligations of INA.

Under the Assumption Agreement, the CIGNA defendants would manage and be responsible for all losses arising from AFIA's business. The CIGNA defendants received all loss reserves held for AFIA business, and the AFIA administrative infrastructure needed to manage its contingent liabilities (including the Rutty Pool liabilities).

Thereafter, the CIGNA defendants, assisted by Rutty, administered the AFIA operations, including the Rutty Pool claims. Nationwide and Home were out of the loop, consistent with the requirements of the Assumption Agreement that:

> In consideration of the transfer by [AFIA] of the assets ... INA hereby assumes as its direct obligation and agrees to pay on behalf of each Seller when payment thereof is due all insurance and reinsurance liabilities of each ....

In May, 1989, the CIGNA defendants reiterated to another former participant in the Rutty Pool that:

> [T]he CIGNA group of companies has assumed full responsibility for all legitimate liabilities of the Home in connection with its participation as reinsurer of Rutty Pool members .... It is, therefore, entirely inappropriate for you to correspond with the Home Insurance Company of

> New York, which has no involvement of this business.

As Rutty Pool liabilities continued, however, the CIGNA defendants became derelict in their duties. They began to distance themselves from the Rutty Pool liabilities, ultimately invoking the following clause in the Assumption Agreement to deny any legal responsibility for their derelictions:

> Nothing in this Assumption Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto ...) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein. ...

The Sixth Circuit agreed with the CIGNA defendants, concluding that notwithstanding their direct assumption of Home's liability to Nationwide, the CIGNA defendants obliterated the very obligation they undertook to perform by inserting a disclaimer clause into the Assumption Agreement.

REASONS FOR ALLOWANCE OF THE WRIT

The Sixth Circuit recognized that the Assumption Agreement is assumption reinsurance (as opposed to the more common indemnity reinsurance). *See, e.g.*, 150 F.3d at 547 ("the reinsurance on [policies Rutty had written in the name of Nationwide] had passed to the CIGNA defendants through the Assumption Agreement"). Once the nature of the parties' reinsurance agreement is established, their legal relationship arises by operation of law. Specifically, assumption reinsurance creates privity between the reinsurer and the insured as a matter of law. The Sixth Circuit wholly ignored this basic principle of insurance law, allowing the "tail" of a disclaimer clause to wag the "dog" of assumption reinsurance.

This Court has twice accepted and decided cases examining the nature and legal effects of reinsurance. *See Colonial American Life Insurance Co. v. Commissioner of Internal Revenue*, 491 U.S. 244 (1989) (*"Colonial"*) (resolving a split in the Circuits over whether reinsurance ceding commissions could be deducted in the year costs were incurred, by analyzing the nature and effect of indemnity and assumption reinsurance agreements); *Hartford Fire Insurance Co. v. California*, (*"Hartford"*) 509 U.S. 764 (1993) (addressing the nature and characteristics of reinsurance to determine whether reinsurers who agreed or acted with foreign reinsurers lost their McCarran-Ferguson Act immunity). Although neither the federal tax code nor the McCarran-Ferguson Act is implicated in this case, federal concerns are no less important.

Assumption agreements serve the international insurance industry by providing a means for one insurer to transfer all or part of its book of business to another, without having to novate thousands (or hundreds of thousands) of individual policies. Assumption agreements serve the interests of policyholders by creating a direct debtorship in the assuming company, and thereby doubling the solvent sources available to cover losses. By creating a second debtorship, assumption agreements give rise to a direct cause of action by the policyholder against the assuming company.

In an era of insurers financially weakened by catastrophic asbestos and pollution claims, and global consolidation in the insurance industry, such dual sources of recovery are critical. The assets of liquidating companies, even in conjunction with state guaranty funds, often cannot cover the incurred losses.

The Sixth Circuit decision in this case effectively allows acquiring companies to have the benefit of loss reserves for assumed obligations, while shielding themselves from the fiduciary responsibilities accompanying the assumed obligations. The insurer that uses an assumption agreement to transfer some or all of a book of business, generally transfers assets, in the form of loss reserves, corresponding with the transferred liabilities. The transferor company thereafter has decreased financial wherewithal to indemnify covered claims, while the acquiring company has full use of the assets. The well-established rule of law that makes the acquiring company directly liable for

the assumed obligations simply follows the asserts available to indemnify the loss.

A. A rule of contract interpretation established by one Circuit that ignores and rewrites the basic reinsurance principles uniformly applied nationwide for over a century, creates confusion in the global arena of reinsurance.

In *Colonial, supra*, this Court explained assumption reinsurance, as distinct from indemnity reinsurance, as follows:

> Reinsurance comes in two basic types, assumption reinsurance and indemnity reinsurance. In the case of assumption reinsurance, the reinsurer *steps into the shoes of the ceding company* with respect to the reinsured policy, assuming all its liability and its responsibility to maintain required reserves against potential claims. The assumption reinsurer thereafter receives all premiums directly and becomes directly liable to the holders of the policies it has reinsured. In indemnity reinsurance ... it is the ceding company that remains directly liable to its policyholders, and that continues to pay claims and collect premiums. The indemnity reinsurer assumes no direct liability to the policyholders. Instead, it agrees to indemnify, or reimburse, the ceding company for a specified percentage of the claims and expenses attributable to the risks that have been reinsured, and the ceding company turns

> over to it a like percentage of the premiums generated by the insurance of those risks.

491 U.S. at 247 (emphasis supplied). Consistent with that explanation, this Court noted in *Hartford, supra*:

> [R]einsurance is so closely tied to the terms of the primary insurance contract that one of the two categories of reinsurance (assumption reinsurance) *substitutes* the reinsurer for the primary or "ceding" insurer and places the reinsurer *into contractual privity* with the primary insurer's policyholders.

509 U.S. at 806 (emphasis supplied). This Court's descriptions of assumption reinsurance – the reinsurer "steps into the shoes of" and "substitutes" for the primary insurer, and is placed "into contractual privity" with the insured – are in full accord with insurance law and treatises. *See, e.g.*, 8 Crouch, *Cyclopedia of Insurance Law*, § 2276, p. 7434:

> [I]n any case where the contract of reinsurance is more than a mere contract of indemnity, and is made for the benefit of the policyholders of the reinsured, and by it the reinsurer assumes the liability of the latter upon its policies, the liability of the reinsurer may be directly enforced by the insured, or by his privies.

The essential flaw in the Sixth Circuit's decision is that it ignores the effect of assumption reinsurance on the parties' legal relationships. For over 100 years, it has been the law in the United States that assumption reinsurance establishes privity between the original

insured and the reinsurer. In addition to *Colonial, supra,* and *Hartford, supra, see*:

> *Johannes v. Phoenix Ins. Co.*, 27 N.W. 414, 417 (Wis. 1886) (where reinsurer assumed the risk of reinsured policies, "[t]he mere fact that the plaintiff was not named in the contract does not preclude him from maintaining an action upon the contract. Thus the policy 'for whom it may concern,' assures all persons having an insurable interest that are intended to be covered by it, whether known to the insurers or not");
>
> *Barnes v. Hekla Fire Ins. Co.*, 57 N.W. 314 (Minn. 1893), syllabus (where a contract of reinsurance "includes a promise or agreement to assume and pay the losses of policy holders, actions, in case of loss, may be brought by them directly against the reinsurer, upon such promise or undertaking");
>
> *Whitney v. American Ins. Co.*, 59 P. 897, 900 (Cal. 1900) (where the reinsurer assumes the risks of the reinsured policies, "[t]he law creates a privity necessary for the maintenance of the action" by the insured against the reinsurer);
>
> *Shoaf v. Palatine Ins. Co.*, 37 S.E. 451 (N.C. 1900) ("[I]t is the implied right, arising out of the express agreement of the defendant [to assume the insured's liabilities], that enables the plaintiffs [insureds] to maintain the action [against the reinsurer]");
>
> *Ruohs v. Traders' Fire Ins. Co.*, 78 S.W. 85 (Tenn. 1903) (where the intent of the reinsurance

agreement was for a reinsurer to assume the insurer's liabilities and stand in the shoes of the insurers vis-a-vis policyholders, insured could recover directly from the reinsurer);

Cosmopolitan Life Ins. Ass'n v. Koegel, 53 S.E. 166 (Va. 1905) (in the case of assumption reinsurance, the law creates the privity that permits a direct action by the insured against the reinsurer);

Southern States Fire Ins. Co. v. Hand-Jordan Co., 73 So. 578 (Miss. 1917) (where policy of reinsurance expressly provides that reinsurer agrees and obligates itself to assume and pay liability under terms of assumed policies, it is an agreement upon which the policyholder is entitled to maintain an action directly against a reinsurer);

People ex rel. Kane v. National Surety Co., 188 P. 653 (Colo. 1920) (where reinsurer agrees to fulfill the obligations of insurer, an insured may sue the reinsurer directly);

Delp v. Missouri State Life Ins. Co., 182 S.E. 580 (W.Va. 1935), syllabus ("A reinsurer, assuming the obligations of the reinsured to the policyholders, is directly liable to the policyholders);

United States Fire Ins. Co. v. Smith, 164 So. 70 (Ala. 1935) (contract of reinsurance whereby reinsurer assumes original insurer's liability on policy, authorizes insured to sue reinsurer directly); and

O'Hare v. Pursell, 329 S.W.2d 614 (Mo. 1959) (where policy of reinsurance provided that reinsurer would assume policy liability, take over loss reserve, and service, adjust and settle obligations directly with insureds, policyholder had direct cause of action against reinsurer).

New York law (which governs the Assumption Agreement in this case) is in accord. *See Glen v. Hope Mut. Life Ins. Co.*, 56 N.Y. 379, 381 (1874) ("[i]t is the settled law that the [insureds] might maintain their action against the [reinsurer] on the three policies which, by its agreement, it had assumed").

In today's global economy, insurance risks are routinely shared in international reinsurance pools. The nature of the reinsuring agreement – indemnity or assumption – is critical to the willingness of participants to engage in a particular transaction. The failure of a United States Circuit Court of Appeal to acknowledge and enforce assumption reinsurance threatens the free flow of international insurance commerce. Such clear error further invites confusion in the application of federal laws – tax, bankruptcy, and antitrust, for example – to the international insurance industry.

B. The Sixth Circuit's conclusion that a third-party disclaimer "tail" can wag the "dog" of an assumption reinsurance agreement contravenes basic rules of insurance and contract law, and is antithetical to commercial reasonableness and the logical intent of the parties.

A disclaimer clause does not change the nature of the obligation assumed in assumption reinsurance, or obliterate the privity of contract supplied by law. The Sixth Circuit committed clear error when it ignored the effect of assumption reinsurance on the legal relationships of the parties, and relied wholly upon New York law indicating that courts will enforce third-party disclaimer provisions.

New York law is certainly not unique in that it will enforce numerous provisions in a party's contract, including third-party disclaimer clauses. But New York law, as the law of other jurisdictions, also seeks to enforce the intent of the parties as evidenced by the contract as a whole. *See, e.g., Empire Properties Corp. v. Manufacturer's Trust Co.*, 43 N.E.2d 25 (N.Y. 1942).

Here, the essential undertaking of the Assumption Agreement is the CIGNA defendants' direct assumption of AFIA's obligations and liabilities, including Home's obligations to cut off Nationwide's Rutty Pool liabilities. It is well established that other provisions in an assumption reinsurance agreement cannot be interpreted to limit or defeat that essential obligation, or impinge on the privity it creates between the reinsurer and insured.

In *Shoaf v. Palatine Ins. Co., supra*, for example, the reinsurer (Palantine Company) sought to avoid a direct suit by the policyholders of the insurer (Merchants' Company) by invoking Article 10 of the reinsurance contract, which:

> . . . provides that [the contract] shall only be effective as between the parties thereto; that no holder of a policy in the Merchants' Company shall be entitled to enforce his contract against the Palantine Company; that the holders of such policies shall prosecute against the Merchants' Company any claim arising under said policy; and the Palantine Company "agrees to pay all such claims legally arising and duly proved ...."

37 S.E. at 451. Rejecting the argument, the North Carolina Supreme Court held that the policyholders' right to sue the reinsurer directly was implied from the nature of the reinsurer's express agreement to assume the obligation. *Id.* at 452 ("It is the implied right, arising out of the express agreement of the defendant, that enables the plaintiffs to maintain the action.") Article 10 of the contract could not defeat that implied right:

> If the plaintiffs have a right to sue the defendant, as we think they have, the two companies cannot, by any agreement between themselves, to which plaintiffs are not a party, defeat that right.

Id.

The assumption reinsurance agreement at issue in *Ruohs v. Traders' Fire Ins. Co., supra*, provided that the agreement would become void if the insurer

(Traders' Company) failed to make certain payments to the reinsurer. 78 S.W. at 85. The Tennessee Supreme Court held that having agreed to assume the Traders' Company liabilities, the reinsurer could not simultaneously escape that obligation by declaring the contract of reinsurance to be void. The Traders' Company's assets and reserves had been transferred to the reinsurer, and "the outstanding policy holders who had been deprived of the assets of the Traders' Company as a security and indemnity for their individual losses could not be prejudiced by such a conditional defeasance whereof they had no knowledge." *Id.* at 91. *See also, People ex rel. Kane v. National Surety Co., supra*, 188 P. at 654 (provision in assumption reinsurance agreement in which reinsurer agrees to "repay" insurer for losses would not affect essential agreement of reinsurer to assume liabilities, which gave rise to a direct right of action by the policyholder against the reinsurer).

Similarly, in this case, the assets and reserves available to pay Rutty Pool losses were transferred from AFIA to the CIGNA defendants. Having received those assets, and having expressly agreed to assume Home's obligations to Nationwide, the CIGNA defendants cannot defeat Nationwide's rights by including a third-party disclaimer clause in the Assumption Agreement.

Instead of applying this well-established law, the Sixth Circuit goes to extreme lengths to ignore the effect of the Assumption Agreement on the legal relationship between Nationwide and the CIGNA defendants. First, it dismisses the CIGNA defendants' essential undertakings in the Assumption Agreement as

irrelevant, because "whether or not there was a direct assumption does not alter the decisive fact that Nationwide is a stranger to the Assumption Agreement," and the Agreement contains a third-party disclaimer clause. 150 F.3d at 549. Next, the Court does away with the Assumption Agreement entirely, concluding that the effect of the disclaimer clause is to leave Nationwide and other insureds:

> ... with exactly the same recourse they would have had if Home and the other members of AFIA had never entered into the Assumption Agreement.

Id. at 549. Finally, the Court asserts that "[t]here is nothing wrong" with its obliteration of the Assumption Agreement, because Nationwide can still pursue its claims against Home and Home "may implead the CIGNA defendants as third-party defendants to Nationwide's action ...." *Id.* at 549.

That will never happen. As part of the Home/CIGNA defendants Agreement, the CIGNA defendants agreed to indemnify Home in any litigation arising out of the assumed obligations. Home therefore will not "implead" the CIGNA defendants when it is sued on the obligations the CIGNA defendants assumed. What will happen is exactly what happened in this case – the CIGNA defendants will take over the defense of Home, one attorney will represent both, and that attorney will strenuously argue that Home stands as an impenetrable barrier between the insured and the CIGNA defendants, thereby insulating the CIGNA defendants from any direct liability should Home become insolvent.

This, then, is the nature of assumption reinsurance as defined by the Sixth Circuit. A reinsurer (like Home) can transfer its reinsurance liabilities to a second reinsurer (like the CIGNA defendants) through an assumption reinsurance agreement that includes a promise to indemnify the first reinsurer in any lawsuit arising out of the assumed obligations. Since it is going to be indemnified in any future lawsuit, the first reinsurer freely agrees to the inclusion of a third-party disclaimer clause in the assumption reinsurance agreement. Now the second reinsurer can escape any direct responsibility for performing its assumed obligations, by claiming that the insureds to whom a duty is owed are "strangers" to the assumption reinsurance agreement.

Such a result perverts the lawful expectations of parties to assumption reinsurance contracts and distorts the international reinsurance market.

CONCLUSION

The District Court properly applied a rule of law that has been uniformly enforced for over a century, when it concluded that because the CIGNA defendants entered into an assumption reinsurance agreement, they "stepped in the shoes" of Home, providing Nationwide a direct right of action for breaches of the assumed obligations. *See Colonial, supra*, 491 U.S. at 247 ("In the case of assumption reinsurance, the reinsurer steps into the shoes of the ceding company"); *Hartford Fire, supra*, 509 U.S. at 806 (assumption reinsurance "places the reinsurer into contractual privity with the primary insurer's policyholders"). The Sixth Circuit skewed that uniform line of authority when it held that the primary

insurer and reinsurer could defeat the primary undertaking of assumption reinsurance by including a third-party disclaimer clause in their agreement. Such a massive rewriting of basic insurance law, and defeat of policyholder rights, should not be accomplished by fiat.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

NATIONWIDE MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee (97-3325)/Cross-Appellant (97-3405),

v.

HOME INSURANCE COMPANY,
Defendant,

Insurance Company of North America; INA Corporation; Cigna Corporation; Cigna International Corporation,
Defendants-Appellants (97-3325)/
Cross-Appellees (97-3405).

Nos. 97-3325, 97-3405

United States Court of Appeals, Sixth Circuit

Argued June 18, 1998.

Decided Aug. 6, 1998.

Insurer brought suit against reinsurer and against assignees that had assumed reinsurer's obligations for breach of reinsurance contract. The United States District Court for the Southern District of Ohio, Edmund A. Sargus, Jr., J. dismissed claims against reinsurer pending arbitration, denied assignees' motion for summary judgment, and dismissed claims against assignees pending arbitration. Assignees appealed, and insurer cross-appealed. The Court of Appeals, Boggs,

Circuit Judge, held that: (1) third-party disclaimer in assumption agreement precluded direct suit by insurer against assignees and limited insurer to exercising its rights against reinsurer, and (2) effect of insolvency clause in assumption agreement was not ripe for adjudication.

Reversed.

[546] Randolph Carson Wiseman, Bricker & Eckler, Columbus, OH; Irene C. Keyse-Walker, Arter & Hadden, Cleveland, OH; Michael L. Cohen, Scanlan, Rosen & Shar, Baltimore, MD, for Plaintiff-Appellee/Cross-Appellant.

Gerald P. Ferguson (briefed), Vorys, Sater, Seymour & Pease, Columbus, OH; Clifford H. Schoenberg (argued and briefed), Harry P. Cohen (briefed), Philip J. Loree (briefed), Rosenman & Colin, New York City, for Defendants-Appellants/Cross-Appellees.

Before: MERRITT, BOGGS, and SUHRHEINRICH, Circuit Judges.

OPINION

BOGGS, Circuit Judge.

Nationwide Mutual Insurance Company ("Nationwide") sued Home Insurance Company ("Home"), INA Corporation Insurance Company of North America ("INA"), CIGNA Corporation, and CIGNA International Corporation. [FN1] In its complaint, Nationwide alleged that Home and the CIGNA defendants had breached reinsurance contracts under which they were responsible for paying certain claims

filed against Nationwide. Nationwide sought declaratory relief as well as compensatory and punitive damages. The district court stayed Nationwide's claims against Home pending arbitration. The parties do not appeal this ruling.

> FN1. When discussed collectively, INA Corporation, INA, CIGNA Corporation, and CIGNA International Corporation will be referred to as "the CIGNA defendants."

After the claims against Home were dismissed pending arbitration, the CIGNA defendants sought summary judgment on the claims against them. The district court denied the CIGNA defendants' motion, referred the claims against the CIGNA defendants to arbitration, and dismissed the entire case. This is the ruling that is the subject of the CIGNA defendants' appeal. Nationwide cross-appeals the district court's rejection of its third-party beneficiary argument, which it claims provides an alternative basis for holding that it can bring an action directly against the CIGNA defendants.

I

A. Nationwide's Reinsurance Agreement With Home

In the 1960's, Nationwide entered into a reinsurance pool managed by the London firm of M.E. Rutty Underwriting Agency Limited ("Rutty"). As a member of this reinsurance pool, Nationwide authorized Rutty to get, underwrite, and administer direct insurance and reinsurance business. Rutty issued policies and contracts in the name of one of the pool members. The pool member whose name was on the insurance policy or reinsurance contract was directly responsible to the

insured. However, the premiums and losses arising from the insurance policies and reinsurance contracts Rutty entered into on behalf of the pool members were divided proportionately among all of the pool members.

Nationwide and some other members of the Rutty Pool withdrew from the pool in 1966. After it withdrew from the pool, Nationwide still had ongoing obligations for continuing and contingent liabilities under insurance policies and reinsurance contracts Rutty issued in its name while it was a member of the pool. To "cut off" its potential future liabilities for insurance and reinsurance obligations arising from its participation in the pool, on June 22, 1977, Nationwide entered into a reinsurance agreement with Home. Under the agreement, Home reinsured [FN2] Nationwide for "all losses which [Nationwide] [547] may be or may become liable to pay arising out of risks written for" Nationwide through the Rutty Pool. This reinsurance agreement contained a broad arbitration clause, permitting either party to compel arbitration as to any disputes relating to the agreement.

> FN2. Home entered into the reinsurance agreement with Nationwide through an insurance pool of United States-domiciled insurers called the American Foreign Insurance Association ("AFIA"). AFIA engaged in foreign insurance and reinsurance business on behalf of Home and its other members. Like Rutty, AFIA would issue insurance policies or reinsurance contracts in the name of a member company that was directly lible to the insured or reinsured, but all members of the pool divided premiums and losses proportionately among themselves.

B. The CIGNA Defendants Accept AFIA's Reinsurance Obligations

On December 31, 1983, the CIGNA defendants entered into purchase and assumption agreements with Home and the other members of AFIA. Under Section 1.1 of the purchase agreement, entitled "Purchase and Sale," the CIGNA defendants agreed to purchase all interests in and rights to the policies and contracts that Home and the other AFIA members entered into through the AFIA pool. This included Home's reinsurance contract with Nationwide for the Rutty Pool liabilities.

In fulfillment of its obligations under Sections 1.1 and 1.4 of the purchase agreement, CIGNA International Corporation caused its subsidiary, INA, to enter into an Insurance and Reinsurance Assumption Agreement ("Assumption Agreement") with Home and the other AFIA members. Under this Assumption Agreement, INA assumed "as its direct obligation and agree[d] to pay on behalf of [Home] when payment thereof is due all insurance and reinsurance liabilities ... included in the AFIA obligations." The Assumption Agreement further provided that "none of the [AFIA members] shall make any payments of any AFIA liability without the prior written approval of INA unless under order of a court ...."

The Assumption Agreement between the CIGNA defendants and the AFIA members also contained an arbitration clause nearly identical to the one in the reinsurance agreement between Home and Nationwide, and it included a choice of law clause providing that New York law would govern the agreement. Finally, the Assumption Agreement also stated:

> Nothing in this Assumption Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto ...) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein ....

Some time after the Assumption Agreement was entered into, claims were made on policies Rutty had written in the name of Nationwide. These policies were among those reinsured by Home. The reinsurance on them had passed to the CIGNA defendants through the Assumption agreement.

C. The District Court's Ruling

In 1995, Nationwide sued Home and the CIGNA defendants, alleging that they had breached contracts under which they were required to cover the claims against Nationwide arising from the policies and contracts from the Rutty Pool. After the claims against Home were stayed pending arbitration, the CIGNA defendants sought summary judgment on the claims against them.

The district court held that Nationwide was not a third-party beneficiary to the agreements between the members of AFIA and the CIGNA defendants. The district court did, however, conclude that Nationwide was an obligee-beneficiary of these agreements and, as such, could pursue a claim directly against the CIGNA defendants for breach of contract under the terms of the

Assumption Agreement between Home and the CIGNA defendants. The court reasoned that the CIGNA defendants stood in the shoes of Home as a direct obligor to Nationwide for purposes of the reinsurance contract between Nationwide and Home. The district court further reasoned that the CIGNA defendants had assumed the reinsurance contract between Home and Nationwide and thus were bound by the arbitration provision in that agreement (the same one the district court relied upon to order arbitration of Nationwide's claims against Home). Therefore, the district court denied the CIGNA defendants' motion for summary judgment, referred Nationwide's claims against them to arbitration, and dismissed the entire case.

[548] II

The central issue on appeal is whether the district court erred in concluding that Nationwide could bring a claim directly against the CIGNA defendants by virtue of the CIGNA defendants' assumption of the reinsurance contract between Nationwide and Home, or whether Nationwide is limited to exercising its rights against Home with respect to payments under this reinsurance contract. The CIGNA defendants argue that Nationwide is precluded from suing them for reinsurance coverage because of the following language:

> Nothing in this Assumption Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto ...) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking, warranty, representation,

> indemnity, covenant or agreement contained herein ....

The CIGNA defendants also contend that Nationwide's status as an obligee-beneficiary does not allow them to avoid the preclusive effect of the above-quoted disclaimer.

Nationwide cross-appeals the district court's ruling that it is not a third-party beneficiary of the agreements between Home and the CIGNA defendants. It raises the third-party beneficiary theory only as an alternative basis for allowing it to pursue a claim directly against the CIGNA defendants and does not seek to reverse the court's ruling that the CIGNA defendants are liable under an assumption theory. Nor does Nationwide challenge the district court's order submitting all of the claims against the CIGNA defendants to arbitration.

We hold that the CIGNA defendants are correct in asserting that Nationwide cannot bring suit directly against them (under either a third-party beneficiary theory or an assumption theory) to recover reinsurance benefits they assumed in their agreements with Home and the other members of AFIA.

A. Nationwide Cannot Bring a Claim Directly Against the CIGNA Defendants

[1] Under New York law, "where a contract's language expressly bars any contractual liability to a third party, no third party right to enforce the contract may be found." *Rosier v. Brown*, 158 Misc.2d 748, 601 N.Y.S.2d 554, 557 (N.Y.Sup.Ct. 1993) (citing *Nepco Forged Prods., Inc., v. Consolidated*, 99 A.D.2d

508, 470 N.Y.S.2d 680, 681 (N.Y.App.Div. 1984)). This is exactly what the third-party disclaimer provision in the Assumption Agreement between the CIGNA defendants and the members of AFIA does.

Despite Nationwide's valiant efforts to concoct alternative meanings of the third-party disclaimer language that would not preclude it from suing the CIGNA defendants on the reinsurance contract they assumed from Home, we hold that the third-party disclaimer language is clear and unequivocal. It bars any person or entity, except the parties to the Assumption Agreement (the members of AFIA and the CIGNA defendants), from suing on any of the obligations undertaken pursuant to the Assumption Agreement, including the CIGNA defendants' obligation to make payments on the reinsurance contract between Nationwide and Home. Under New York law, contract language is ambiguous "when it is reasonably susceptible to more than one reading." *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 695 (2d Cir. 1998). We do not find reasonable any construction of the disclaimer at issue that seeks to qualify or limit its broad, simple, and absolute language preventing any third party from enforcing the Assumption Agreement.

When the members of AFIA assigned their policies and contracts to the CIGNA defendants, they were free to negotiate an agreement under which the CIGNA defendants as assignees would permit direct recourse against themselves if they did not fulfill their obligations under the reinsurance contracts of Home and other members of AFIA. The AFIA members did not do this. Instead, they signed an agreement that

expressly excluded insureds from having recourse against the assignees if those assignees failed to satisfy their obligations under [549] the Assumption Agreement. This left the insured with exactly the same recourse they would have had if Home and the other members of AFIA had never entered into the Assumption Agreement.

There is nothing wrong with this. Nationwide is not without recourse. It can pursue its claims against Home. If coverage is due, Home will be forced to meet its obligation to Nationwide and then seek indemnification from the CIGNA defendants or Home may implead the CIGNA defendants as third-party defendants to Nationwide's action for reinsurance payments. The insolvency of Home could affect this. However, as we explain below, we need not consider the effects that insolvency may have on the parties' respective rights and obligations because this issue is not yet ripe for review.

[2] The district court's holding that Nationwide was entitled to pursue its claims for breach of the assignment agreement directly against the CIGNA defendants was premised on a legally erroneous distinction between obligee-beneficiaries and third-party beneficiaries. Obligee-beneficiaries are simply one type of third-party beneficiaries. 4 *Corbin on Contracts* § 774 at 6 (7th ed.1989). Therefore, whether or not Nationwide is an obligee-beneficiary is of no legal significance. It is still not a party to the agreement between the members of AFIA and the CIGNA defendants and thus is precluded from bringing a claim directly against the CIGNA defendants to enforce the

reinsurance obligations the CIGNA defendants assumed from Home.

Our conclusion that under the circumstances of this case Nationwide cannot be considered a party to the agreement between the members of AFIA and the CIGNA defendants is supported by *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 196 N.Y.S.2d 945, 164 N.E.2d 832, 836 (1959). In *Nicholson*, an embossing company entered into an agreement with an adjoining building owner, Nicholson, to furnish steam heat to Nicholson's building. *Id.* 164 N.E.2d at 833. Some years later, the embossing company assigned this obligation to 300 Broadway Realty, which expressly assumed the obligation to provide steam heat to Nicholson's building, but failed to do so. *Id.* at 164 N.E.2d 832 at 834-36. Nicholson then sued 300 Broadway Realty under the contract Broadway had assumed. The New York Court of Appeals held that, for purposes of the assumption contract, the embossing company was the promisee, 300 Broadway Realty was the promissor, and Nicholson was a "third-party beneficiary." [FN3] *Id.*

> FN3. Although Nationwide is a third party to the Assumption Agreement in the sense that it is not a party to it, for reasons explained below, unlike Nicholas, Nationwide cannot be classified as a third-party beneficiary entitled to bring suit to enforce an agreement to which it is not a party.

[3] It is clear that the disclaimer barred third parties from enforcing rights under the contract applies to Nationwide. Nationwide argues that it should be deemed beyond the scope of the disclaimer because the CIGNA defendants directly assumed Home's

reinsurance obligation to Nationwide in the sense that they agreed to make payments directly to Nationwide and other insureds. This argument fails, however, because whether or not there was a direct assumption does not alter the decisive fact that Nationwide is a stranger to the Assumption Agreement through which it seeks to impose liability upon the CIGNA defendants.

Since Nationwide cannot bring suit directly against the CIGNA defendants on the Assumption Agreement or any obligations assumed therein, it cannot compel the CIGNA defendants to submit to arbitration under the terms of a contract they assumed in the Assumption Agreement with the members of AFIA.

B. Nationwide's Cross-Appeal

[4] Our resolution of the CIGNA defendants' appeal also disposes of Nationwide's cross-appeal regarding the district court's holding that Nationwide is not entitled to bring a claim directly against the CIGNA defendants under a third-party beneficiary theory. Nationwide is a third party to the Assumption Agreement in the same generic sense as every individual and entity on earth (other than the members of AFIA and the CIGNA defendants), in that it is not a party [550] to the agreement. As such, the disclaimer provision precludes it and all other third parties to the contract from enforcing it. By precluding any third party from enforcing the agreement, this same disclaimer defeats Nationwide's claim that it belongs to the discrete subset of generic third parties referred to as third-party beneficiaries, whose distinguishing characteristic is their legal right to enforce contracts to which they are not a party. See *Rosier v. Brown*, 158

Misc.2d 748, 601 N.Y.S.2d 554, 557 (N.Y.Sup.Ct. 1993) (citing *Nepco Forged Prods., Inc. v. Consolidated*, 99 A.D.2d 508, 470 N.Y.S.2d 680, 681 (N.Y.App.Div. 1984). Accordingly the district court was correct to hold that Nationwide is not a third-party beneficiary.

C. Issues Relating to the Insolvency Clause are not Ripe for Decision

[5] Finally, we refuse the CIGNA defendants' invitation to rule on the effects the insolvency clause of the Assumption Agreement may have on Nationwide's ability to pursue coverage under its reinsurance agreement with Home. Issues related to insolvency are not yet ripe for consideration on the merits. Home is not insolvent at this time. A basic tenet of the doctrine of ripeness is that "a matter is considered premature for judicial review when the alleged injury is speculative or may never occur." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1068 (6th Cir. 1998) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

III

The judgment of the district court submitting Nationwide's claims against the CIGNA defendants to arbitration and dismissing the case is REVERSED. The claims against the CIGNA defendants cannot be submitted to arbitration because the express disclaimer in the Assumption Agreement prevents Nationwide from suing the CIGNA defendants to enforce the reinsurance obligations the CIGNA defendants assumed from Home. We remand the case to the district court to enter an

order dismissing Nationwide's claims against the CIGNA defendants.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

NATIONWIDE MUTUAL INSURANCE CO.,
Plaintiff,

v.

THE HOME INSURANCE CO., et al.,
Defendants

Case No. C2-95-CV-880
Judge Sargus
Magistrate Judge Kemp

OPINION AND ORDER

Plaintiff Nationwide Mutual Insurance Company ["Nationwide"] brings this diversity action asserting various claims under an international reinsurance contract. Named as defendants are the Insurance Company of North America, INA Corporation, CIGNA Corporation and CIGNA International Corporation [collectively referred to as "the CIGNA defendants"], and the Home Insurance Company ["Home"]. The Court has stayed Nationwide's claims against defendant Home pending arbitration. Opinion and Order (Oct. 21, 1996). This matter is before the Court on the CIGNA defendants' motion for summary judgment.

Background

For purposes of resolving the instant motion, the underlying facts of this action are generally not in dispute. Nationwide participated in the M.E. Rutty Reinsurance Pool ["Rutty Pool"] from 1962 to 1966. The Rutty Pool managed direct and reinsurance business related to property and casualty risks. Participants, including Nationwide, insured or reinsured all or part of certain risks by entering into a cross-liability agreement whereby each participant assumed responsibility for money unpaid by another participant due to insolvency.

The amended complaint alleges that, in the mid-1970's, Nationwide sought to end its participation in the Pool when its account had nearly runoff, i.e., assets available to pay off claims under extant policies were nearly depleted. Nationwide allegedly entered into a tripartite agreement ["Reinsurance Agreement"], with Rutty and Home, whereby Home, acting as an issuing reinsurer for the American Foreign Insurance Association ["AFIA"], assumed the obligations, and succeeded to the rights, of Nationwide as a participant in the Rutty Pool. See Reinsurance Contract No. R (attached as exhibit 1 to Nationwide's Memorandum in Opposition to Motion for Summary Judgment (Oct. 25, 1996)). According to Nationwide, the purpose of the Reinsurance Agreement was only to assume potential liabilities, which at the time appeared to be minimal because the Rutty Pool had not issued any new policies during the preceding ten years.

It is undisputed that Home, at some time after the effective date of the Reinsurance Agreement, went into "runoff." According to defendants, Home continues to

be in runoff, but is still a functioning entity. According to Nationwide, Home's failure was the result of unexpectedly large asbestos and pollution losses and courts' liberal interpretation of insurance coverage for those losses.

In 1983, CIGNA purchased the assets of AFIA and assumed all AFIA obligations. See Purchase Agreement No. 1 (attached as exhibit 2 to Nationwide's Memorandum in Opposition to Motion for Summary Judgment). Home and INA (which appears to be a subsidiary of CIGNA, see page 2 of exhibit H attached to Purchase Agreement, letter from senior counsel at CIGNA representing that "CIGNA International, INA, and each Purchaser are indirect wholly owned subsidiaries of CIGNA"), among others, executed an Assumption Agreement effective "simultaneously with the Closing of the Purchase Agreement ...." Insurance and Reinsurance Assumption Agreement, at 1 (attached as exhibit 3 to Nationwide's Memorandum in Opposition).

It is undisputed that CIGNA and/or its subsidiaries thereafter administered the AFIA operations, including the Reinsurance Agreement between Nationwide and Home. Nationwide asserts that CIGNA executed Purchase Agreement No. 1 ["Purchase Agreement"] before realizing the extent of Rutty losses.

Nationwide brings claim for breach of contract, promissory estoppel, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, and negligence. It is undisputed that New York law governs the parties' substantive disputes. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The amended

complaint seeks compensatory and punitive damages and declaratory relief.

Analysis

Standard of Review

The procedure for granting summary judgment is found in Fed.R.Civ.P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986). But summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 251.

Breach of Contract

CIGNA asserts that the Court must dismiss Nationwide's claim for breach of contract. Count II of the First Amended Complaint alleges that the parties to the Purchase Agreement intended that anyone who had purchased insurance or reinsurance from Home, including Nationwide, would be a direct and intended third party beneficiary of the Purchase Agreement. The amended complaint further alleges that, although CIGNA assumed Home's obligations to Nationwide under the Rutty Pool, CIGNA has failed to fulfill those obligations.

CIGNA contends that the following provision in the Purchase Agreement precludes third parties such as Nationwide from enforcing provisions of the Purchase Agreement:

> ... this [Agreement] shall be binding on and inure to the benefit of the parties hereto and their respective successors and assigns. Nothing in this [Agreement], express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto and their permitted successors and assigns), any rights or remedies under or by reason of this [Agreement], or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein.

Purchase Agreement, ¶12 (emphasis supplied). CIGNA asserts that such provision is controlling under New York law. See Nepco Forged Products, Inc. v.

Consolidated Edison Co. of New York, Inc., 470 N.Y.S.2d 680, 681 ("Where a provision exists in an agreement expressly negating an intent to permit enforcement by third parties, as exists in the agreement at bar, that provision is decisive.") (citation omitted)

Nationwide, on the other hand, contends that the general purpose of the Purchase Agreement was for CIGNA to assume the obligations of Home, and that the Court should therefore disregard the disclaimer provision, which Nationwide discards as "boilerplate." Nationwide argues, instead, that it states a claim as an intended third party beneficiary of the Purchase Agreement between Home and CIGNA. See Twin City Construction Co. of Fargo, N.D. v. ITT Industrial Credit Co., 358 N.W.2d 716 (Minn. 1984) (construction company was a third party beneficiary to financing agreement between a bank and a development company where a condition of that agreement was that construction company execute a subrogation agreement releasing mechanic's lien on the subject property and promising to complete the project even if the development company defaulted on its payments to construction company) (citing Restatement (Second) of Contracts, §302 (1979)[1]). The Court agrees with

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[1] §302, which addresses intended beneficiaries, provides:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promisee to pay money to the beneficiary; or

CIGNA that ¶12 of the Purchase Agreement clearly and unambiguously prevents anyone from claiming status as a third-party beneficiary to that Agreement. See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc. 66 N.Y.2d 38, 44 n.2 ("intention [to benefit a third party] can be negated by express agreement of the promisor and the promisee"). Nationwide therefore fails to state a claim as a third party beneficiary to the Purchase Agreement. Likewise, the Court holds that Nationwide fails to state a claim under New York law that CIGNA waived its right to enforce the disclaimer provision. Data Electric Co., Inc. v. NAB Construction Corp., 383 N.Y.S.2d 14, 15 (1976) ("We are unaware of any authority (and our attention has been called to none) which goes so far as to create privity of contract on which a plaintiff seeks to predicate liability because of the waiver of the defendant of benefits flowing to it in a contract with a third party.")

However, rejection of Nationwide's status as a third-party beneficiary is not necessarily dispositive of Nationwide's claim for breach of contract. §1 of the Purchase Agreement, which relate to the purchase and sale of AFIA interests, provides in part:

> ... [Home and others] severally agree to sell and assign to one or more of the Purchasers, and CIGNA agrees to purchase or to cause such Purchaser or Purchasers to purchase, ... all of the [Home's] right, title and interest in and to the

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(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

> AFIA Interests .... CIGNA agrees, on the terms and conditions of this Agreement, on the Closing Date to cause one or more of the Purchasers and INA to assume the AFIA Obligations, becoming primarily liable in respect thereof ....

Purchase Agreement, §1.1.

Home, by means of that provision, unambiguously assigned its rights and delegated its duties under the Reinsurance Agreement to CIGNA. As a result, CIGNA stepped into the shoes of Home as a party to the Reinsurance Agreement. Nationwide may therefore pursue a claim for breach of contract as an obligee-beneficiary of the Purchase Agreement. See 4 Corbin on Contracts §866, at 453 (1951) ("The assumption of the assignor's duty by the assignee merely gives to the other party a new and added security"). As set forth below, New York law supports this holding.

"The mere assignment of a bilateral executory contract may not be interpreted as a promise by the assignee to the assignor to assume the performance of the assignor's duties, so as to have the effect of creating a new liability on the part of the assignee to the other party to the contract assigned." Kagan v. K-Tel Entertainment, Inc., 568 N.Y.S.2d 756, 758 (1991) (citation omitted). "The rule is otherwise if the circumstances surrounding the assignment fairly indicate a contrary intention." Goldsmith v. Deitchman, 69 N.Y.S.2d 148, 151-52 (1947). "[I]n the absence of an affirmative assumption, an assignee is not liable on any covenants or agreements by which the assignor may have bound himself ...." Hudson Engineering

Associates, P.C. v. Ames Development Corp., 643 N.Y.S.2d 677, 678 (1996).

Case law from other states support those general propositions. See e.g. Cascade Shopping Center v. United Grocers, Inc., 106 Or.App. 428 (1991) (In general, if an assignment of contract is valid, it does not impose on assignee liabilities of assignor without assignee's assumption of those liabilities; by assuming assignor's liabilities, assignee creates privity of contract with party to whom assignor is liable); Banner Supply Co. v. Habitat 1 Construction Corp., 519 So.2d 1 (Fla. 1987) (generally unless the assignee assumes the assignor's duties or liabilities, assignee is not affirmatively liable to debtor); Meyers v. Postal Finance Co., 287 N.W.2d 614 (Minn. 1979) (assignment of a contract does not impose upon assignee duties or liabilities imposed by contract on assignor in the absence of the assignee's specific assumption of such liabilities); Farmers Acceptance Corp. v. DeLozier, 178 Colo. 291 (1972).

In Explosive Chemical Co. v. William S. Gray & Co., 207 N.Y.S. 638 (1925), defendant agreed to perform most of the obligations owed by the plaintiff to the federal government arising under a contract in return for payment as required by the original contract less a commission to be paid by defendant to plaintiff. Defendant complied as promised. After plaintiff agreed to satisfy the remaining obligation of the original contract, plaintiff sued defendant to recover.

The court, finding in favor of the plaintiff, held that, if the assignee is obligated to perform the assignor's obligation to a party to the original contract,

the "[a]ssignor of contract is secondarily, and assignee primarily, liable for performance." Explosive Chemical, 207 N.Y.S. at 638. The court explained:

> the defendant is under a duty to repay the plaintiff, because the plaintiff as assignor became only secondarily liable, while the defendant was in effect primarily liable, and consequently the plaintiff, in paying the debt when the principal debtor did not, was subrogated to the rights which the United States could have had against the defendant by exercising its privilege to ratify the assignment, and so plaintiff can hold defendant for the payment ....

Explosive Chemical, 207 N.Y.S. at 643.[2]

Here, CIGNA expressly assumed Home's liabilities to the Rutty Pool. In doing so, CIGNA received the benefits available to Home under the Rutty Pool, and CIGNA cannot walk away from its obligations which it voluntarily agreed to assume.

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[2] The Supreme Court of New York reversed that decision on the basis that "there never was an assignment of the contract." Explosive Chemical Co. v. William S. Gray & Co., 212 N.Y.S. 324, 326 (1925). The court noted that defendant had agreed to assume most, not all, obligations of the plaintiff to the original contract. However, the appellate court did not take issue with the lower court's legal analysis that defendant, by virtue of its agreement with plaintiff, was contractually bound to the government to perform certain obligations despite the fact that the government was not a party to the agreement between plaintiff and defendant.

The Court has thoroughly reviewed the Purchase Agreement and is unable to locate any provision exempting CIGNA from assuming Home's obligation to the Rutty Pool. On the contrary, the Purchase Agreement reflects that CIGNA affirmatively intended to assume Home's AFIA obligations, including Home's obligation to the Rutty Pool.[3] A review of applicable New York law, while sparse, in addition to case law from other states, supports the Court's conclusion that Nationwide, as an obligee-beneficiary, states a claim for breach of contract against CIGNA.

Liability of INA

Defendant INA asserts that, regardless of the potential liability of the other CIGNA defendants, it has no liability because it is not a party to the AFIA agreements. Nationwide appears to concede that defendant INA is not a party to the AFIA agreements. INA has submitted an affidavit of James Sears, vice-president and controller of INA, who avers that "INA Corp. is not a party to the AFIA Agreements. ... Moreover, INA Corp. is not obligated directly or indirectly or by way of side agreement or otherwise to perform any of the duties and obligations arising under any of the AFIA Agreements." Sears Affidavit, ¶2 (attached as exhibit C to CIGNA's Reply Memorandum (Nov. 15, 1996)).

---

[3] Indeed, CIGNA admitted at oral argument that Home could seek relief against CIGNA in the event that Nationwide prevails against Home in the instant action.

However, the Purchase Agreement signed by INA provides that "one or more of the Purchasers and INA are to assume certain obligations, all as more fully described herein ...." Purchase Agreement, at 2. The Purchase Agreement goes on to state that "CIGNA agrees, on the terms and conditions of this Agreement, on the Closing Date to cause one or more of the Purchasers and INA to assume the AFIA Obligations, becoming primarily liable in respect thereof." Purchase Agreement, §1.1 (emphasis added). Moreover, the Assumption Agreement provides, "INA hereby assumes as its direct obligation and agrees to pay on behalf of each Seller [including Home] when payment thereof is due all insurance and reinsurance liabilities of each of the Assigning Sellers arising under or related to the business of AFIA described in Section 1.1(c)(ii) of the Purchase Agreements and included in AFIA Obligations ...." Assumption Agreement, ¶2. The Assumption Agreement further provides that "INA shall (1) administer and service the AFIA Liabilities including their investigation, payment, settlement, defense and the processing and collection of any reinsurance related thereto, (2) have authority to act in the name of a Seller as may be required to perform such administration and service, and (3) bear all costs and expenses related to the AFIA Liabilities and their administration and services .... Assumption Agreement, ¶3.

The language from the Assumption Agreement belies INA's assertion that it has no obligation to perform any of the duties arising under the AFIA agreements. Accordingly, the Court declines to dismiss INA as a party defendant.

Arbitration

The Court has already determined that Nationwide must arbitrate its claims against Home. Opinion and Order (Oct. 21, 1996).[4] CIGNA, standing in the shoes of Home, is bound by the same arbitration provision which Home, CIGNA's predecessor in interest, successfully enforced against Nationwide.

---

[4] The Reinsurance Agreement has an arbitration clause which provides in pertinent part:

> As a precedent to any right of action hereunder, if any dispute shall arise between the Reinsured and the Reinsurers with reference to the interpretation of this Contract or their rights with respect to any transaction involved, whether such dispute arises before or after termination of this Contract, such dispute, upon written request of either party, shall be submitted to three arbitrators, one to be chosen by each party, and the third by the two so chosen. ... All arbitrators shall be executive officers of insurance or reinsurance companies or Underwriters at Lloyd's, London not under the control of either party to this Contract.
>
> The arbitrators shall interpret this Contract as an honorable engagement and not as merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law, and they shall make their award with a view of effecting the general purpose of this Contract in a reasonable manner rather than in accordance with a literal interpretation of the language. ...

Reinsurance Contract No. R, Article XIII (attached as exhibit A to Memorandum of Law of Defendant The Home Insurance Company (Oct. 13, 1995)).

Nationwide now asserts that its claims against CIGNA must also be referred to arbitration. See Supplemental Memorandum of Nationwide Mutual Insurance Company, at 5-6.

The Court agrees with Nationwide that arbitration in this instance is appropriate. Home agreed to arbitrate with Nationwide its disputes under the Rutty Pool. Reinsurance Contract No. R, Article XIII. CIGNA, by virtue of the assignment of rights and delegation of duties from Home, is bound by that arbitration provision. Purchase Agreement, §1.1.

In Compania Espanola de Petroleos S.A. v. Neureus Shipping S.A., 527 F.2d 966, 973 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976), the guarantor agreed both to perform balance of contract and to assume rights and obligations of the character. The Court held that the guarantor was obliged to arbitrate disputes between it and the agent under a contractual arbitration clause. See also Paine Webber Inc. v. Hartmann, 921 F.2d 507 (3d Cir. 1990) ("arbitration should be compelled unless it can be said with 'positive assurance' that the agreement to arbitrate does not cover the dispute") (cited with approval in Roney and Co. v. Kassab, 981 F.2d 894, 898 (6th Cir. 1992)).

While it is for the arbitration panel to initially determine the scope of the arbitration clause, the broad language of the contract requires the parties to arbitrate "any dispute ... with reference to the interpretation of this contract or their rights with respect to any transaction involved ...." Reinsurance Contract, Article XIII. See also Nat'l Union Fire Insurance Co. v. Belco Petroleum Corp., 88 F.3d 129, 136 (2d Cir. 1996)

("The provision covers 'all disputes which may arise under or in connection with this policy' and is not limited ... to disputes that require an interpretation of the AIG Policy.") Moreover, the Court believes that, in the interest of judicial economy, a single forum is best suited to resolution of all claims. Accordingly, this entire matter must be referred to arbitration.

Conclusion

For the foregoing reasons, CIGNA's motion for summary judgment is DENIED, and this action is REFERRED to arbitration pursuant to Article XIII of the Reinsurance Agreement. Accordingly, this action hereby is DISMISSED.

/s/ Edmund A. Sargus, Jr.
Edmund A. Sargus, Jr.
United States District Judge

3-25-97
Date

JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO

Nationwide Mutual Insurance Co.,
Plaintiff,

v.

The Home Insurance Co., et al.,
Defendants.

JUDGMENT IN A CIVIL CASE

Filed March 25, 1997

Case No.: C2-95-880
Judge Sargus
Magistrate Judge Kemp

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury as rendered its verdict.

[X] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is hereby **DISMISSED** pursuant to the Court's March 25, 1997 Opinion and Order denying CIGNA's motion for

summary judgment and **REFERRING** this action to arbitration pursuant to Article XIII of the Reinsurance Agreement.

March 25, 1997
Date

KENNETH J. MURPHY
Clerk

/s/ Michael Carey
(By) Deputy Clerk
Michael Carey

Supreme Court, U.S.
FILED
JAN 11 1999
OFFICE OF THE CLERK

No. 98-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

INSURANCE COMPANY OF NORTH AMERICA, CIGNA CORPORATION and CIGNA INTERNATIONAL CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under New York law, a clear and unambiguous disclaimer clause in an agreement, stating that the agreement confers no rights or remedies on any third party, bars a non-party to the agreement from enforcing it.

STATEMENT UNDER RULE 29.6

The parties to this proceeding are set forth in the caption. Respondents make the following disclosure pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States:

CIGNA Corporation
CIGNA Holdings, Inc.
CIGNA Information Services, Inc.
CIGNA Investment Group, Inc.
CIGNA International Finance Inc.
CIGNA International Investment Advisors, Ltd.
CIGNA Fund Managers Limited
CIGNA Mezzanine Holdings, Inc.
CIGNA International Investment Advisors Australia Limited
CIGNA International Investment Advisors K.K.
Malrosian, Inc.
CIGNA Investment Advisory Company, Inc.
CIGNA Investments, Inc.
CIGNA Advisory Partners, Inc.
CIGNA Funds Group
CIGNA Financial Futures, Inc.
CIGNA High Income Shares
CIGNA Institutional Funds Group
CIGNA Leveraged Capital Fund, Inc.
CIGNA Funding Limited Partnership
CIGNA Mezzanine Partners III, Inc.
CIGNA Variable Products Group
INA Investment Securities, Inc.
CIGNA Mezzanine Capital, Inc.
CIGNA Mezzanine Holdings II, Inc.
Silver Brook Real Estate Development Company
CIGNA Properties, Inc.
CIGNA Conference Facilities, Inc.

Connecticut General Corporation
Benefits Access Inc.
CG Individual Tax Benefits Payments, Inc.
CG Life Pension Benefit Payments, Inc.
CG LINA Pension Benefits Payments, Inc.
CG Trust Company
CIGNA Benefits Processing Ireland Ltd.
CIGNA Dental Health, Inc.
CIGNA Dental Health of California, Inc.
CIGNA Dental Health of Colorado, Inc.
CIGNA Dental Health of Delaware, Inc.
CIGNA Dental Health of Florida, Inc.
CIGNA Dental Health of Illinois, Inc.
CIGNA Dental Health of Kansas, Inc.
CIGNA Dental Health of Kentucky, Inc.
CIGNA Dental Health of Maryland, Inc.
CIGNA Dental Health of New Jersey, Inc.
CIGNA Dental Health of New Mexico, Inc.
CIGNA Dental Health of North Carolina, Inc.
CIGNA Dental Health of Ohio, Inc.
CIGNA Dental Health of Pennsylvania, Inc.
CIGNA Dental Health of Texas, Inc.
CIGNA Dental Health Plan of Arizona, Inc.
CIGNA Employee Benefits Services, Inc.
CIGNA Financial Partners, Inc.
CIGNA Realty Resources, Inc. – Fifth
The Tulsa Corporation
CIGNA Realty Resources, Inc. – Twelfth
CIGNA Realty Resources, Inc. – Fifteenth
Connecticut General Realty Resources, Inc. – Fourth
CIGNA Financial Services, Inc.
CIGNA Health Corporation
Healthsource, Inc.
Contemporary Management Associates, Inc.
Healthsource Connecticut, Inc.
Healthsource Corporate Services, Inc.

Healthsource Innovative Medical Management, Inc.
Healthsource Employee Services, Inc.
Healthsource Health Plans, Inc.
CIGNA Healthcare of North Carolina, Inc.
Healthsource North Carolina, Inc.
Healthsource North Carolina Administrators, Inc.
Healthsource Indiana, Inc.
Healthsource Indiana Insurance Company
Healthsource Indiana Managed Care Plan, Inc.
Healthsource Insurance Group, Inc.
Healthsource Kentucky Ventures, Inc.
Healthsource Kentucky, Inc.
Healthsource Maine, Inc.
Healthsource Maine Preferred, Inc.
Healthsource Management, Inc.
Healthsource Syracuse, Inc.
Healthsource New York, Inc.
Healthsource HMO of New York, Inc.
Healthsource Preferred of New York, Inc.
CIGNA Healthcare of Tennessee, Inc.
Healthsource Preferred, Inc.
Healthsource Massachusetts, Inc.
Healthsource Metropolitan New York Holding Company, Inc.
Healthsource New York/New Jersey, Inc.
Healthsource New Hampshire, Inc.
Healthsource Ohio, Inc.
Healthsource Ohio Preferred, Inc.
Healthsource Preferred, Inc.
Healthsource Properties, Inc.
Healthsource Rhode Island, Inc.
Healthsource RX, Inc.
Healthsource South, Inc.
Healthsource Arkansas Ventures, Inc.
Healthsource Arkansas, Inc.
Healthsource Arkansas Preferred, Inc.

Spradley & Coker, Inc.
Healthsource Insurance Company
Healthsource Physicians Group of South Carolina, Inc.
Healthsource Provident Administrators, Inc.
CIGNA Healthcare of Texas, Inc.
HS North Texas Ventures, Inc.
Provident Health Care Plans, Inc.
CIGNA Healthcare of Georgia, Inc.
Employee Benefit Plan Administration, Inc.
Physicians' Health Systems, Inc.
Healthsource Insurance Services, Inc.
Healthsource South Carolina, Inc.
Arizona Health Plan, Inc.
CIGNA Healthcare Mid-Atlantic, Inc.
CIGNA Healthcare of Arizona, Inc.
CIGNA Community Choice, Inc.
CIGNA Healthcare of California, Inc.
CIGNA Healthcare of Colorado, Inc.
CIGNA Healthcare of Connecticut, Inc.
CIGNA Healthcare of Delaware, Inc.
CIGNA Healthcare of Florida, Inc.
CIGNA Healthcare of Illinois, Inc.
CIGNA Healthcare of Louisiana, Inc.
CIGNA Healthcare of Massachusetts, Inc.
CIGNA Healthcare of New Jersey, Inc.
CIGNA Healthcare of New York, Inc.
CIGNA Healthcare of Northern New Jersey, Inc.
CIGNA Healthcare of Ohio, Inc.
CIGNA Healthcare of Oklahoma, Inc.
CIGNA Healthcare of Pennsylvania, Inc.
CIGNA Healthcare of St. Louis, Inc.
CIGNA Healthcare of Utah, Inc.
CIGNA Healthcare of Virginia, Inc.
Lovelace Health Systems, Inc.
Ross Loos Hospital, Inc.
Temple Insurance Company Limited

CIGNA Healthcare Benefits, Inc.
CIGNA Integratedcare, Inc.
CIGNA Managed Care Benefits Company
CIGNA Re Corporation
Blodget & Hazard Limited
Connecticut General Benefit Payments, Inc.
Connecticut General Life Insurance Company
1717 Main Street Corporation
6000 Fairview Associates, LLC
6010 Fairview Associates, LLC
All-Net Preferred Providers, Inc.
Brook Arbor Company LLC
CG 6, LLC
Cal Portfolio VI, LLC
CG Michigan Properties, LLC
Center City Realty, LLC
Transwestern/CG II, LLC
Center Harbor LLC
CIGNA CBO 1996-1 Ltd.
CIGNA CBO 1996-1 (Delaware) Corp.
CIGNA Dullestown LLC
CIGNA Life Insurance Company
CIGNA Mortgage Securities, Inc.
Connecticut Sugar Creek LLC
Cottage Grove Cable II, LLC
Cottage Grove Vessels, Inc.
Draper's CG, LLC
Engineered Data Products, Inc.
GPM Gas Gathering L.L.C.
Houston Properties, L.L.C.
Transwestern/Connecticut Partners GP I LLC
MNH Mall, LLC
PCGP, Inc.
Quebec Street Investments, Inc.
Ridgedale REIT, Inc.
Riverside South Forty L.L.C.

Rosado Grande, Inc.
SAR at Shawnee Ridge, L.L.C.
SAR Legacy, L.L.C.
Shorebreeze Associates, L.L.C.
Southland REIT, Inc.
Disability Claim Services, Inc.
Global Portfolio Strategies, Inc.
INA Life Insurance Company of New York
INA Tax Benefits Reporting, Inc.
International Rehabilitation Associates, Inc.
Intracorp Peer Review Organization, Inc.
Intracorp, Inc.
Life Insurance Company of North America
AIC Holdings, Inc.
CIGNA Direct Marketing Company, Inc.
CIGNA Life Insurance Company of Canada
Cottage Grove Cable IV, LLC
INA Himawari Life Insurance Co., Ltd.
LINA Benefit Payments, Inc.
MCC Behavioral Care, Inc.
MCC Independent Practice Association of Greater New York, Inc.
MCC Behavioral Care of California, Inc.
Tel-Drug, Inc.
Trilog, Inc.
INA Corporation
CIGNA International Holdings, Ltd.
AFIA Finance Corporation
AFIA Socieda Anonima
AFIA Venezolana, C.A.
CIGNA Brasil Participacoes Ltda.
CIGNA Servicos Ltda.
Excel CIGNA Seguradora S.A.
CIGNA Italy – Societa a Responsabilita Limitata
CIGNA Thai Company Limited
Corafin S.A.C.I.F.A.

ESIS International Asesorias Limitada
Fire, Equity and General Insurance Company Limited
Indi Servicios C. Ltda.
Inversiones Continental, S.A. de C.V.
P.T. Asuransi CIGNA Indonesia
Riyad Insurance Company Ltd.
Safire Private Limited
AFIA (CIGNA) Corporation, Limited
AFIA (INA) Corporation, Limited
AFIA
Amazonas Compania Anonima de Seguros
Arabia CIGNA Insurance Company Limited E.C.
CIGNA Argentina Compania de Seguros S.A.
CIGNA Brasil Empreendimentos Ltda.
Amico Assistencia Medica A Industria E Comercio Ltda.
INA Seguradora S.A.
CIGNA Compania de Seguros (Chile) S.A.
CIGNA G.B. Holdings, Ltd.
CIGNA Reinsurance Company (UK) Limited
CIGNA Services U.K. Limited
Ernest Linsdell Limited
CIGNA UK Retirement Savings Plan
Crusader Insurance Company (Ghana) Limited
Crusader Company (Ghana) Limited
Insurance Company of North America (U.K.) Limited
CIGNA Healthcare Management Company (India)
Private Limited
CIGNA Insurance Asia Pacific Limited
CIGNA Insurance Singapore Limited
CIGNA Superannuation Pty. Limited
CIGNA Insurance Company Limited
CIGNA Insurance Company of Puerto Rico
CIGNA Insurance New Zealand Limited
CIGNA Life Insurance New Zealand Limited
CIGNA International Corporation
CIGNA Eastern European Corporate Services SP. Z O.O.

CIGNA International Insurance Company of Hong Kong Limited
CIGNA International Insurance Managers, Ltd.
CIGNA Overseas Insurance Company Ltd.
Banco Excel Economico S.A.
CIGNA Accident and Fire Insurance Company, Ltd.
CIGNA China Investment Fund LDC
CIGNA Marketing Group, C.A.
CIGNA Overseas Holdings, Inc.
CIGNA Insurance Company of Europe S.A.-N.V.
CIGNA Life Insurance Company of Europe S.A.-N.V.
CIGNA STU S.A.
CIGNA STU Zycie S.A.
Grancol, Asesoramiento Y Servicios Ltda.
CIGNA Seguros de Colombia S.A.
CIGNA Worldwide Insurance Company
P.T. Asuransi Niaga Cigna Life
PCIB CIGNA Life Insurance Corporation
Century Inversiones, S.A.
CIGNA de Venezuela Intermediarios de Reaseguros S.A.
Compania Anonima de Seguros "Avila"
Cover Direct, Inc.
Victoria Hall Company Limited
Delpanama S.A.
Empresa Guatemalteca CIGNA de Seguros, Sociedad Anonima
Contabilidad Mecanizada, Sociedad Anonima
ESIS International, Inc.
ESIS International (Puerto Rico), Inc.
Inacan Holdings Ltd.
CIGNA Insurance Company of Canada
Inacap Sociedad Anonima
Inacap – Reaseguros, Sociedad Anonima
Inamex, S.A.
Inaven, C.A.
Inversiones INA Limitada

CIGNA Compania de Seguros de Vida (Chile) S.A.
CIGNA Salud Isapre S.A.
Unimed S.A. Isapre Medica
La Positiva, Compania Nacional de Seguros Sociedad Anonima
Maritime General Insurance Company Limited
Perdana CIGNA Insurance Berhad
Philippine Healthcare Providers, Inc.
Reaseguradoro Nuevo Mundo S.A.
Seguros Azteca, S.A.
Seguros CIGNA, S.A.
Seguros Comercial America, S.A. de C.V.
INA Financial Corporation
CIGNA Financial Institution Solutions, Inc.
Brandywine Holdings Corporation
CIGNA Run-Off Services, Inc.
Cravens, Dargan & Company, Pacific Coast
Cravens, Dargan & Company, Pacific Coast of Illinois, Inc.
Assurex Development Corporation
CIGNA International Reinsurance Company Ltd.
CIGNA International Brokers, Ltd.
Century Indemnity Company
Century Reinsurance Company
CIGNA Reinsurance Company
CIGNA Reinsurance Company S.A.-N.V.
The 1792 Company
Cottage Grove Cable I, L.L.C.
Western Agency Management, Inc.
Robert F. Coleman, Inc.
International Surplus Adjusting Services
National Employee Benefits Corporation
INA Holdings Corporation
American Adjustment Company, Inc.
American Lenders Facilities, Inc.
Bankers Standard Insurance Company

Bankers Standard Fire and Marine Company
CIGNA Property and Casualty Insurance Company
ALIC, Incorporated
CIGNA Lloyds Insurance Company
CIGNA Fire Underwriters Insurance Company
CIGNA Insurance Company
Pacific Employers Insurance Company
CIGNA Insurance Company of Texas
Illinois Union Insurance Company
CIGNA Insurance Company of the Midwest
CIGNA Real Estate, Inc.
CONGEN Properties, Inc.
2525 East Arizona Biltmore Circle Corp.
Cottage Grove Cable III, LLC
ESIS, Inc.
CIGNA Excess and Surplus Insurance Services, Inc. (GA)
CIGNA Excess and Surplus Insurance Services, Inc. (CA)
CIGNA Excess and Surplus Insurance Services, Inc. (IL)
CIGNA Excess and Surplus Insurance Services, Inc. (PA)
Excess and Surplus Insurance Services, Inc.
INA Special Risk Facilities, Inc.
INAC Corp.
INAC Corp. of California
INAMAR Insurance Underwriting Agency, Inc.
INMAR Insurance Underwriting Agency, Inc. of Massachusetts
INAMAR Insurance Underwriting Agency, Inc. of Ohio
INAMAR Insurance Underwriting Agency, Inc. of Texas
INAPRO, Inc.
Reinsurance Solutions International, LLC

Global Surety Network, Inc.
Insurance Company of North America
Atlantic Employers Insurance Company
Cover-All Technologies, Inc.
CIGNA Employers Insurance Company
CIGNA Insurance Company of Ohio
Indemnity Insurance Company of North America
Allied Insurance Company
CIGNA Indemnity Insurance Company
CIGNA Insurance Company of Illinois
INA Surplus Insurance Company
Rain and Hail Insurance Service Incorporated
Marketdyne International, Inc.
CIGNA Railroad Insurance Brokers, Inc.
Recovery Services International, Inc.

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POINT I

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Respondents Insurance Company of North America, ("INA"), CIGNA Corporation ("CIGNA Corp."), and CIGNA International Corporation (collectively, the "CIGNA Respondents") respectfully submit this brief in opposition to the petition (the "Petition") of Nationwide Mutual Insurance Company ("Nationwide") for a writ of certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit. That decision is reported at 150 F.3d 545 (6th Cir. 1998) and is reprinted in the appendix to the Petition.[1]

STATEMENT OF THE CASE

This diversity case concerns the Sixth Circuit's straightforward application of well-established principles of New York contract law to an agreement expressly governed by New York law. The Sixth Circuit reversed the District Court's judgment, holding that the "express disclaimer" in the Insurance and Reinsurance Assumption Agreement (the "Assumption Agreement") between one of the CIGNA Respondents and The Home Insurance Company ("Home") prevented Nationwide from suing the CIGNA Respondents to enforce reinsurance obligations assumed from Home under that agreement. (App. 9) Construing New York contract law, the Sixth Circuit held that "[d]espite Nationwide's valiant efforts to concoct alternative meanings of the third-party disclaimer language that would not preclude it from suing the [CIGNA Respondents] . . . the third-party disclaimer language is clear and unequivocal." (App. 9) The Sixth Circuit concluded that "Nationwide cannot bring suit directly against the [CIGNA Respondents] on the Assumption Agreement or any obligations assumed

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[1] References to the appendix of the Petition are designated with the prefix "App."

therein. . . ." (App. 12) This uncontroversial conclusion – resting as it does on well-established principles of New York law that the Sixth Circuit was bound to follow – cannot under any stretch of the imagination provide a basis for a grant of certiorari.

A. Nationwide's Participation In The Rutty Reinsurance Pool

During the mid-1960's, Nationwide participated in a reinsurance pool managed by M.E. Rutty Underwriting Agency Limited ("Rutty"). (A116)[2] In connection with that pool, Nationwide, pursuant to certain underwriting agreements (the "Underwriting Agreements"), delegated to Rutty the authority to produce, underwrite and administer a book of direct and reinsurance business. (A116) As a member of the pool, Nationwide received a proportionate share of the premiums and was liable for a proportionate share of the losses on the business underwritten by Rutty pursuant to, and in accordance with, the terms of the Underwriting Agreements. (A116)[3]

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[2] Citations with the prefix "A" refer to the joint appendix filed with the Sixth Circuit.

[3] The Rutty reinsurance pool operated as follows: Rutty, on behalf of the pool, issued policies or contracts or reinsurance to insureds or reinsureds in the name of (or "on the paper" of) one of the pool members. (A146) That pool member was referred to as the issuing carrier and was directly liable to the insured/reinsured. Pursuant to the pool arrangements, however, the premiums and losses arising from the underlying policy or contract were shared proportionately by all of the pool members. (A117)

B. Home's Reinsurance Of Nationwide

In 1977, Nationwide entered into a reinsurance agreement, entitled "Reinsurance Contract No. R" (the "Reinsurance Agreement" (A228-40), with Home. Pursuant to the Reinsurance Agreement, Home agreed to reinsure Nationwide with respect to "all losses which [Nationwide] may be or may become liable to pay arising out of risks written for" Nationwide by Rutty pursuant to, and in accordance with, the terms of the Underwriting Agreements. (A228)[4]

C. Home's Participation In AFIA And CIGNA's Purchase Of AFIA

Home was a member of an association of U.S.-domiciled property and casualty insurance companies – the American Foreign Insurance Association ("AFIA") – which collectively engaged in foreign insurance, surety and reinsurance business.[5]

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[4] The Reinsurance Agreement contains a broad arbitration clause. (A232-33) By Opinion and Order filed with the Clerk on October 21, 1996 (A281-94), the District Court granted Home's motion to compel arbitration of Nationwide's claims against Home.

[5] AFIA was authorized by members to produce, underwrite and administer a block of insurance and reinsurance business. AFIA issued policies or contracts of reinsurance to insureds or reinsureds in the name of (or "on the paper" of) one of the members (depending on which member was authorized in a given jurisdiction). That member was referred to as the issuing carrier and was directly liable to the insured/reinsured. However, the premiums and losses

(continued)

On December 30, 1983, the CIGNA Respondents entered into "Purchase Agreement No. 1" (the "Purchase Agreement") (A572-676) with Home and other members of AFIA pursuant to which the CIGNA Respondents purchased certain rights and interests relating to the business of AFIA. Under Section 1 of the Purchase Agreement, entitled "Purchase and Sale of the AFIA Interests," CIGNA Corp. agreed "on the Closing Date to cause one or more of the Purchasers and INA to assume the AFIA Obligations, becoming primarily liable in respect thereof." (A579) CIGNA Corp.'s agreement "to cause" INA to assume the AFIA Obligations is further described in Section 1.4 of the Purchase Agreement, entitled "The Closing," which provides, in pertinent part:

> The closing . . . shall be held . . . on January 31, 1984 and [a]t the Closing, . . . (a) CIGNA [Corp.] . . . (ii) will cause to be delivered to the Sellers [including Home] an instrument or instruments . . ., which shall contain provisions substantially as set forth in Exhibit C hereto . . . evidencing . . . INA's assumption of the respective AFIA Obligations.

(A581)

(continued from previous page . . .)

arising from the underlying policy or contract were shared proportionately by all of the members. In entering into the Reinsurance Agreement, Home acted as the issuing carrier for the AFIA pool members. (A147)

Pursuant to Sections 1 and 1.4 of the Purchase Agreement, CIGNA Corp. "caused" INA to enter into the Assumption Agreement (A677-89) with Home and other members of AFIA. (The Purchase Agreement and the Assumption Agreement are sometimes hereinafter collectively referred to as the "AFIA Agreements.") The Assumption Agreement contains provisions substantially as set forth in Exhibit C to the Purchase Agreement, is dated January 31, 1984 (the date of the Closing) and was delivered to the Sellers (including Home) at the closing on January 31, 1984. (A677-89)

The Reinsurance Agreement was among the AFIA Obligations covered by the Assumption Agreement. Thus, pursuant to the Assumption Agreement, INA, prior to Home's insolvency, "assume[d] as its direct obligations and agrees to pay on behalf of [Home] when payment thereof is due all insurance and reinsurance liabilities . . . included in AFIA Obligations." (A679) (emphasis added)

The parties to the Assumption Agreement, however, expressly and unambiguously made INA's obligations enforceable only by Home (or by Home's statutory successor) and not by Nationwide. Indeed, Section 12 of the Assumption Agreement (the disclaimer clause) provides, in pertinent part:

> Nothing in this Assumption Agreement express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto and their permitted successors and assigns) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking,

> warranty, representation, indemnity, covenant or agreement contained herein.

(A687-88) (emphasis added)

Section 13.4 of the Purchase Agreement (the disclaimer clause) likewise unequivocally provides:

> Nothing in this Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto and their permitted successors and assigns) any rights or remedies under or by reason of this Agreement, or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein.

(A634) (emphasis added) Both the Assumption Agreement (A687) and the Purchase Agreement (A636) expressly provide that they "shall be governed by and construed and enforced in accordance with the laws of the State of New York."

D. The CIGNA Respondents' Summary Judgment Motion And Judge Sargus' March 25, 1997 Opinion and Order

On or about September 21, 1995, Nationwide served its First Amended Complaint which alleged that Nationwide is a "direct and intended third-party beneficiar[y]" of the Purchase Agreement and the Assumption Agreement and asserted various claims directly against the CIGNA Respondents. (A122-24)

In November 1995, the CIGNA Respondents moved for summary judgment dismissing Nationwide's First Amended Complaint on the ground that the disclaimer clauses in the Purchase Agreement and the Assumption Agreement clearly and unambiguously provide that Nationwide has no right or remedy under either of those agreements.

On or about March 25, 1997, the District Court issued its Opinion agreeing with the CIGNA Respondents that Nationwide is not a third-party beneficiary but nevertheless denying the CIGNA Respondents' motion for summary judgment. (App. 20-21) In addition, although Nationwide never made (a) a cross-motion for summary judgment or (b) an application to compel arbitration, the District Court effectively granted summary judgment in favor of Nationwide, finding that Nationwide, as a non-party, nevertheless had a right and a remedy directly against the CIGNA Respondents for an alleged breach of contract and compelled arbitration, finding that "[the CIGNA Respondents], standing in the shoes of Home, [are] bound by the same arbitration provision which Home, [the CIGNA Respondents'] predecessor in interest, successfully enforced against Nationwide." (App. 22, 27)

The District Court correctly ruled in a concise and cogent analysis, that:

a. "[Paragraph] 12 of the Purchase Agreement [i.e., the disclaimer provision] clearly and unambiguously prevents anyone from claiming status as a third-party beneficiary to that Agreement" (App. 21); and

b. "Nationwide fails to state a claim under New York law that [the CIGNA Respondents] waived their right to enforce the disclaimer provision." (App. 21)

The District Court, however, also stated that "rejection of Nationwide's status as a third-party beneficiary is not necessarily dispositive of Nationwide's claim for breach of contract" (App. 21), and held that "Nationwide may . . . pursue a claim [against the CIGNA Respondents] for breach of contract as an obligee-beneficiary of the Purchase Agreement." (App. 22) Finding that the CIGNA Respondents "stood in the shoes of Home," it dismissed the action and referred Nationwide's claims against the CIGNA Respondents to arbitration under the arbitration clause in Home's Reinsurance Agreement with Nationwide. (App. 27)

E. The Sixth Circuit's Decision

The CIGNA Respondents appealed to the Sixth Circuit, and Nationwide cross-appealed the District Court's finding that Nationwide was not a third-party beneficiary of the AFIA Agreements. (App. 3) The Sixth Circuit reversed the District Court's judgment referring Nationwide's claims to arbitration and remanded the case for the District Court to enter an order dismissing Nationwide's claims against the CIGNA Respondents. (App. 13-14)

In a well-reasoned opinion firmly grounded in New York law, the Sixth Circuit ruled that:

> Despite Nationwide's valiant efforts to concoct alternative meanings of the third-party disclaimer language that would not preclude it from suing the [CIGNA Respondents] on the reinsurance contract they

> assumed from Home, we hold that the third-party disclaimer language is clear and unequivocal. It bars any person or entity, except the parties to the Assumption Agreement (the members of AFIA and the [CIGNA Respondents]), from suing on any of the obligations undertaken pursuant to the Assumption Agreement, including the [CIGNA Respondents'] obligation to make payments on the reinsurance contract between Nationwide and Home. Under New York law, contract language is ambiguous when it is reasonably susceptible to more than one reading. We do not find reasonable any construction of the disclaimer at issue that seeks to qualify or limit its broad, simple, and absolute language preventing any third party from enforcing the Assumption Agreement.

(App. 9) (emphasis added; citation and quotation omitted)

The Sixth Circuit also pointed out that the District Court's decision was "premised on a legally erroneous distinction between obligee-beneficiaries and third-party beneficiaries." (App. 10) (emphasis added) Correctly noting that an "obligee beneficiary" is "simply one type of third-party beneficiaries," the court observed that "whether or not Nationwide is an obligee-beneficiary is of no legal significance":

> [Nationwide] is still not a party to the agreement between the members of AFIA and the [CIGNA Respondents] and thus is precluded from bringing a claim directly against the [CIGNA Respondents] to enforce

> the reinsurance obligations the [CIGNA Respondents] assumed from Home.

(App. 10-11)

The Sixth Circuit also rejected Nationwide's argument that the disclaimer does not apply to it "because the [CIGNA Respondents] directly assumed Home's reinsurance obligation to Nationwide in the sense that they agreed to make payments directly to Nationwide and other insureds." (App. 11-12) The court correctly ruled that "whether or not there was a direct assumption does not alter the decisive fact that Nationwide is a stranger to the Assumption Agreement through which it seeks to impose liability upon the [CIGNA Respondents]." (App. 12)

Finally, the Sixth Circuit ruled against Nationwide on its cross-appeal, finding that the District Court correctly held that Nationwide was not a third-party beneficiary:

> [T]he disclaimer provision precludes [Nationwide] and all other third parties to the . . . [Assumption Agreement] from enforcing it. By precluding any third party from enforcing the agreement, this same disclaimer defeats Nationwide's claim that it belongs to a discrete subset of generic third parties referred to as third-party beneficiaries, whose distinguishing characteristic is their legal right to enforce contracts to which they are not a party.

(A12-13) (citations omitted)

REASONS FOR DENYING THE WRIT

Standard For Granting Writ Of Certiorari

The rules of this Court state that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10 (1997). This Court does not review questions of state law except where there has been "blatant federal court nullification of state law." Leavitt v. Jane L., 518 U.S. 137, 145 (1996); see also Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept, and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."). "[A] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

POINT I

THE SIXTH CIRCUIT'S DECISION IS LIMITED TO STATE LAW ISSUES, WHICH THIS COURT REVIEWS ONLY IN CERTAIN "EXTRAORDINARY" CIRCUMSTANCES THAT ARE ABSENT HERE

Nationwide concedes that there are no constitutional or statutory provisions at issue here. (Petition at 4.) Moreover, Nationwide does not claim that the Sixth Circuit's decision: (1) conflicts with a decision of another U.S. court of appeals on the "same important matter," Sup. Ct. R. 10(a); (2) decided an "important federal question" in a way that conflicts the decision of a state court of last resort, id.; or (3) involves "an important question of federal law" that should be settled by this Court. See Sup. Ct. R. 10(c).

The Petition merely raises an issue of state law, i.e., whether, under New York contract law, the disclaimer clause in the Assumption Agreement barred Nationwide's claims against the CIGNA Respondents. The Supreme Court, however, will review decisions on state law issues only in "extraordinary" or "exceptional" cases where there has been "blatant federal-court nullification of state law." Leavitt, 518 U.S. at 145; Huddleston, 322 U.S. at 237.

A. The Sixth Circuit's Decision Did Not Nullify New York State Law

Here, the Sixth Circuit did not nullify New York law, blatantly or otherwise, and Nationwide does not (and cannot) argue that it did. Indeed, Nationwide concedes, as it must, that "New York law . . . will enforce third-party disclaimer provisions" in contracts. (Petition at 18.) The Petition simply asserts that the Sixth Circuit should not have applied this well-established New York law on disclaimer clauses to the Assumption Agreement at issue in this case. (See id.)

Specifically, Nationwide's asserts that (a) the Sixth Circuit recognized that the Assumption Agreement was "assumption reinsurance" and (b) "assumption reinsurance creates privity between the reinsurer and the insured as a matter of law." (Petition at 11.) According to Nationwide, by enforcing a third party disclaimer clause in a purported "assumption reinsurance" agreement, the Sixth Circuit's decision established "a rule of contract interpretation" "that ignores," "rewrites," and "contravenes basic rules of insurance and contract law . . . " (Petition at 13, 18.)

This argument misses the point entirely. Even assuming (contrary to fact and law) that the Assumption

Agreement is an "assumption reinsurance" agreement,[6] Nationwide's burden on its Petition was to demonstrate that (a) New York law does not permit enforcement of third-party beneficiary disclaimer provisions contained in "assumption reinsurance" agreements (even though such clauses are concededly enforceable in all other agreements); and (b) the Sixth Circuit blatantly nullified this principle of New York law by enforcing the third-party disclaimer in the Assumption Agreement.

Nationwide has not met – and could not possibly meet – this burden because New York law permits parties to include third-party disclaimer clauses in all agreements, including assumption agreements. New York's highest court has held that, regardless of the label used, the non-party's right to recover directly from the assuming party under an "assumption agreement" must be determined by applying third-party beneficiary law principles:

> Accepting, as on this appeal we must, the truth of the allegations that the express provisions of assumption were actually made by Spitzer and Thompson, as agents, acting for and on behalf of the defendant, there can be no doubt that the plaintiffs have a direct right of action against the latter to enforce the contract duty explicitly assumed by it through agents. The assumption agreement between

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[6] Contrary to Nationwide's assertions, the Sixth Circuit did not find that that the Assumption Agreement constituted "assumption reinsurance." Indeed, the term "assumption reinsurance" appears nowhere in the Sixth Circuit's opinion. (See App. 1-14.) Thus, Nationwide's argument rests on a false premise.

> Embossing and the defendant . . . constitutes a creditor beneficiary contract in which Embossing is promisee, the defendant is promisor and the plaintiffs are third-party beneficiaries.

Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832, 836 (N.Y. 1959) (emphasis added) (internal quotation omitted); Langel v. Betz, 250 N.E. 159, 163 (N.Y. 1928); Rosenheck v. Calcam Associates, Inc., 649 N.Y.S.2d 247, 249 (3d Dep't 1996); United States Cas. Co. v. Jungreis, 250 N.Y.S.2d 749, 750 (1st Dep't 1964).

Ironically, Nationwide's own authority, Glen v. Hope Mut. Life Ins. Co., 56 N.Y. 379 (1874), hammers this point home, making clear that a non-party's right to enforce an "assumption reinsurance" agreement is likewise governed by third-party beneficiary principles. In finding that an insured could recover from the reinsurer under an assumption reinsurance contract, the court relied on Lawrence v. Fox, 20 N.Y. 168 (1859), one of the seminal New York cases on the third-party beneficiary doctrine. See Fourth Ocean Putnam Corp v. Interstate Wrecking Co., 485 N.E.2d 208, 211 (N.Y. 1985); Seaver v. Ransom, 120 N.E. 639, 640 (N.Y. 1918).[7]

Of course, one fundamental tenet of New York's third-party beneficiary doctrine is that the parties may negate by agreement any intention to confer benefits on a non-party. See Morse/Diesel, Inc. v. Trinity Indus., Inc., 859 F.2d 242, 249 (2d Cir. 1988); Fourth Ocean, 465 N.E.2d at 212 n.2; Binghamton Masonic Temple Inc. v. City of Binghamton, 623 N.Y.S.2d 357, 360 (3d Dep't 1995), leave to appeal

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[7] Hope Mutual is thus completely in accord with Nicholson, 164 N.E.2d at 836, which also relied on Lawrence.

denied, 655 N.E.2d 400 (N.Y. 1995); NEPCO Forged Products, Inc. v. Consolidated Edison Co., 470 N.Y.S.2d 680, 681 (2d Dep't 1985); Edward B. Fitzpatrick, Jr. Constr. Corp. v. Suffolk County, 525 N.Y.S.2d 863, 866 (2d Dep't 1988), appeal denied, 534 N.E.2d 315 (N.Y. 1988), rearg. denied, 536 N.E.2d 631 (N.Y. 1989); City of Olean v. New York State Envtl. Facilities Corp., 625 N.Y.S.2d 775, 776 (4th Dep't 1995), rearg. denied, No. 152/95, 153/95, 1995 WL 350154 (4th Dep't Jun. 9, 1995); Rosier v. Brown, 601 N.Y.S.2d 554, 557 (Rochester City Ct. 1993).

Thus, under New York law, an assumption agreement does not magically transform the assuming party into a party to the underlying agreement between the non-party and the party whose obligations are assumed. Rather, the non-party is simply a putative third-party beneficiary whose rights (if any) can be – as the District Court, the Sixth Circuit (App. 9, 21) and New York's highest court have recognized, Fourth Ocean, 485 N.E.2d at 212 n.2. – "'negated by express agreement of the promisor and the promisee.'" In other words, it is the parties' intention to confer (or not confer) third-party beneficiary status that controls, not the legal label of "assumption" or "reinsurance assumption."

Accordingly, New York law fully recognizes that disclaimer provisions in assumption agreements (including "reinsurance assumption" agreements) are valid and enforceable. Therefore, far from blatantly nullifying New York law, the Sixth Circuit correctly applied it and enforced the third-party disclaimer clause in the Assumption Agreement. Indeed, if this Court were to grant certiorari and reverse the Sixth Circuit, this Court would be guilty of blatantly nullifying New York law.

Hard as it may try, Nationwide cannot justify review by stating that the Sixth Circuit's decision "ignor[ed] and

rewr[ote] basic reinsurance principles" and "contravenes basic rules of insurance and contract law . . . . " (Petition 13, 18.) As a federal court with diversity jurisdiction over this dispute, the Sixth Circuit was, of course, bound to follow New York law, not general or "basic" principles of some chimerical, free-floating insurance, reinsurance and contract law. Any suggestion that the Sixth Circuit should have followed "basic" rules of insurance or reinsurance law was laid to rest more than 60 years ago in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law.

Id., 304 U.S. at 64. If there were any doubt as to whether the Erie doctrine applied to contracts of insurance, it was forever laid to rest in Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 205 (1938).

Nationwide's cases demonstrate that its "basic principles" of law are not basic principles of New York law. Colonial Am. Life Ins. Co. v. Commissioner, 491 U.S. 244 (1989) and Hartford Fire Ins. Co v. California, 509 U.S. 764 (1993), do not even purport to apply New York law and do not address the issue of the enforceability of a third-party disclaimer clause under any body of law, let alone purported "basic rules" of insurance or contract law. They merely make general statements regarding the differences between

"indemnity reinsurance" and "assumption reinsurance." Those distinctions have no bearing on this case.[8]

Likewise, with one exception, the remaining twelve cases cited by Nationwide do not apply New York law. Thus, these cases are also irrelevant. The one exception, Hope Mutual, soundly supports the Sixth Circuit's decision for the reasons explained on p. 14, supra.[9]

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[8] Furthermore, Nationwide admits that Hartford and Colonial have no application here. After noting that Colonial involved a split in the courts of appeals over federal tax code issues, and Hartford involved the issue of antitrust immunity under the McCarran-Ferguson Act, Nationwide concedes that "neither the federal tax code nor the McCarran-Ferguson Act is implicated here." (Petition at 11.)

Nationwide also seeks to justify review by suggesting that the Sixth Circuit's decision conflicts with Colonial and Hartford. First, as discussed in the text, supra, there is no conflict because those cases do not rely on New York law, and, in any event, do not address the enforceability of a third-party disclaimer clause. Second, although certiorari based on a conflict with a decision of this court may be proper where a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this court," there are no federal questions at issue here. Sup. Ct. R. 10(c) (emphasis added).

[9] While Nationwide's cases may be dismissed without further discussion, it is still interesting to note that, of the many non-New York cases relied upon by Nationwide, only one – Shoaf v. Palatine Ins. Co., 37 S.E. 451, 452 (N.C. 1900) – addresses disclaimer clauses of any kind. The disclaimer clause there, however, did not contain

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Finally, in correspondence between the parties, counsel for Nationwide asserted that this Court will grant certiorari in order to assure uniformity among the federal courts on basic contract principles.[10] It is not, of course, the

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anything even remotely resembling the "[n]othing in this Agreement [to the contrary], express or implied" language which is controlling here. Beyond that, this turn of the century North Carolina case was obviously decided long before North Carolina adopted § 302 of the Restatement (Second) of Contracts, which provides that circumstances which otherwise would indicate an intent to give a third party the benefit of promised performance "can be negated by express agreement of the promisor and the promisee" See Fourth Ocean, 485 N.E.2d at 212 n.2 (adopting Restatement (Second) of Contracts, § 302). Now that North Carolina has adopted § 302, Shoaf is no longer good law even in North Carolina. See Snyder v. Freeman, 266 S.E.2d 593, 604 (N.C. 1980) (expressly adopting identical 1973 predecessor version of § 302 of the Restatement); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 407 S.E.2d 178, 180 (N.C. 1991) (applying § 302 of the Restatement in denying plaintiff's third-party beneficiary claim). Finally, even if Shoaf were still good law, Shoaf addressed only a situation in which there was "a substitution of parties by mutual consent," i.e., a novation. U.S., to Use of Colonial Brick Corp. v. Federal Sur. Co., 5 F. Supp. 247, 250 (D. Md. 1933), aff'd, 72 F.2d 964 (4th Cir. 1934) (distinguishing Shoaf on this ground). Here, as in Federal Surety, it is undisputed that there has been no novation. (A 130)

[10] The only case cited by Nationwide's counsel, New York Life Ins. Co. v. Viglas, 297 U.S. 672 (1936), was decided approximately three years before Erie and Ruhlin. In any

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function of this Court to make sure that state courts or federal courts sitting in diversity apply state law on reinsurance uniformly. See Erie, 304 U.S. at 75; Ruhlin, 304 U.S. at 206-207. This court would subvert the purpose of the Erie doctrine if it accepted Nationwide's invitation to attempt to render uniform the laws of the fifty states. See Erie, 304 U.S. at 75 ("In attempting to promote uniformity of law throughout the United States, the doctrine [of Swift v. Tyson] had prevented uniformity in the administration of law of the state.") (emphasis added).

B. Nationwide's Attempt To Justify Review By Asserting That The Sixth Circuit Defeated The Expectations Of The Parties Is Unavailing

Unable to legitimately argue that the Sixth Circuit's decision "nullified" New York law, Nationwide asserts that the Sixth Circuit's decision "perverts the lawful expectation of parties to assumption reinsurance contracts . . . " by enabling "the primary insurer and reinsurer . . . [to] defeat

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event, it provides no support for the proposition that the court will grant certiorari in order to insure uniformity in state law. Viglas was a diversity case in which the defendant claimed that the jurisdictional amount required by the federal statute had not been met. The Court granted certiorari to resolve a conflict with one of its earlier decisions on a federal question, i.e., the computation of damages for the purposes of the jurisdictional amount required by statute. See Viglas, 297 U.S. at 675-76. Once again, there are no federal statutes or questions involved in this case. (See Petition at 4.)

the primary undertaking of assumption reinsurance by including a third-party disclaimer clause in their agreement." (Petition at 22-23.) Once again Nationwide misses the point. Even assuming the Assumption Agreement is an assumption reinsurance agreement, New York law permits the parties to that agreement to exclude non-parties from enforcing that agreement. If Nationwide believes that is unjust, it should petition the New York State legislature or the New York State Insurance Department, not this Court.

In any event, Nationwide's argument makes no sense. Nationwide is not a party to the Assumption Agreement and thus – like any other non-party – cannot have any "lawful expectations" under the Assumption Agreement. As the Sixth Circuit recognized (App. 9), the disclaimer clause dispositively reveals the lawful expectation of the parties' agreement, i.e., that neither Nationwide nor any other third party would have any right to enforce that agreement.

By the same token, Nationwide's suggestion that he disclaimer clause has "defeat[ed]" its "rights" begs the question. (Petition at 20.) Nationwide has no rights under the Assumption Agreement because the parties decided that neither Nationwide nor any other non-party would have any rights under the agreement. As the Sixth Circuit aptly pointed out, "[t]here is nothing wrong with this." (App. 10) It left Nationwide "with exactly the same recourse they would have had if Home and the other members of AFIA had never entered into the Assumption Agreement." (App. 10) Nationwide has the right to pursue its claims against Home and "[i]f coverage is due, Home will be forced to meet its obligations to Nationwide and then seek indemnification from the [CIGNA Respondents]" or Home may implead the CIGNA Respondents. (App. 10)

Nationwide, however, cynically contends that this "will never happen." (Petition at 21.) According to Nationwide, the CIGNA Respondents will "take over the defense of Home" and "argue that Home stands as an impenetrable barrier between the insured and the [CIGNA Respondents], thereby insulating the [CIGNA Respondents] from any direct liability should Home become insolvent." (Petition at 21.)

This assertion is groundless for at least two reasons. First, Home is not insolvent, and as the Sixth Circuit pointed out, no harm befalls Nationwide for having to seek recourse from Home. Second, on appeal Nationwide contended that issues regarding the parties' rights and liabilities in the event of Home's insolvency were not ripe for review. The Sixth Circuit agreed with Nationwide and did not rule on those issues. (App. 13) Nationwide cannot now raise the specter of Home's insolvency (an event which may never occur) to justify review of the Sixth Circuit's decision in this Court.[11]

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[11] Peppered throughout the Petition are thinly veiled (and unsupported) suggestions by Nationwide that a transfer of assets from Home to the CIGNA Respondents has somehow prejudiced Nationwide. (See, e.g., Petition at 20.) Nationwide, of course, has not and cannot demonstrate it has somehow been prejudiced by any transfer of assets.

POINT II

NATIONWIDE'S ATTEMPT TO JUSTIFY REVIEW BECAUSE OF PURPORTED "FEDERAL CONCERNS" IS UNAVAILING

Grasping at straws, Nationwide asserts that there are "federal concerns" present here and conclusorily argues that the Sixth Circuit's decision will somehow invite "confusion in the application of federal laws – tax, bankruptcy and antitrust, for example – to the international insurance industry." (Petition at 11, 17.) Leaving aside that Supreme Court Rule 10 nowhere refers to the "federal concerns" Nationwide cites, the Petition does not articulate just how the Sixth Circuit's decision could possibly lead to confusion in the application of bankruptcy, tax, antitrust, or any other federal laws. In any event, the mere fact that a transaction may tangentially relate to a body of federal law – for example, federal tax laws – does not mean that the courts should create what, in effect, would be federal general common law to govern the transaction itself. Reinsurance is a good example. Reinsurance transactions are subject to federal tax laws. State law, however, governs the interpretation and construction of reinsurance agreements. Erie, 304 U.S. at 78; Ruhlin, 304 U.S. at 205. Finally, the alleged "confusion" that Nationwide claims will arise in the application of federal laws because of the Sixth Circuit's decision cannot form the basis of a grant of a certiorari, because no federal laws are implicated here and there is thus simply no justiciable issue for review.

As part and parcel of its "federal concerns" argument, Nationwide claims (without citing any authority in support) that the "nature of the reinsuring agreement – indemnity or assumption – is critical to the willingness of participants to engage in a particular transaction," and that the "failure of a

United States Court of Appeals to acknowledge and enforce assumption reinsurance threatens the free flow of international insurance commerce." (Petition at 17.) This argument is pure sophistry.

First, the possibility that a court of appeal's ruling on a state law decision in a diversity case may affect international commerce is not a ground for certiorari, where as here, no constitutional provisions, treaties or federal statutes are implicated. See Leavitt, 518 U.S. at 145; Sup. Ct. R. 10. Indeed, all sorts of transactions governed by state law may affect international commerce in one way or another.

Second, the nature of the reinsuring agreement between two parties may well be important to them. As a matter of logic, the nature of the agreement – assumption or indemnity – can never be "critical" to the willingness of a non-party like Nationwide to participate or engage in the transaction which is the subject of the agreement. As Nationwide's own case law makes clear, "assumption reinsurance" agreements generally concern one company's assumption of a portfolio of existing business from another company. At the time that business was written, the insureds and reinsureds would ordinarily have no idea whether their insurer or reinsurer might at some point enter into an "assumption reinsurance" agreement. Thus, "assumption reinsurance" agreements can hardly be said to encourage parties to enter into insurance or reinsurance transactions.

Third, the Sixth Circuit did not "fail to enforce" an assumption reinsurance agreement. Assuming that the Assumption Agreement is in fact an "assumption reinsurance" agreement, the Sixth Circuit enforced it according to its terms.

Finally, Nationwide also attempts to raise "federal concerns" because assumption reinsurance agreements allegedly "serve the international insurance industry" and provide "critical" "dual sources of recovery" to policyholders. (Petition at 12.) Even if true, this statement is irrelevant. Regardless of how important assumption reinsurance agreements may or may not be, the rights and obligations owed to a non-party under those agreements is determined by state law and thus raises no "federal concerns."

Nationwide is obviously not happy with the result reached by the Sixth Circuit. But all the Sixth Circuit did was enforce a contract under New York law according to its plain and unambiguous terms. If, as Nationwide contends, the type of contract into which Home and the CIGNA Respondents entered is somehow inimical to the insurance industry or may otherwise cause regulatory problems, those problems would be appropriately addressed (if at all) by the state legislature or insurance department. It is not, however, for this Court, the Sixth Circuit or the District Court to rewrite the parties' contract simply because Nationwide, a non-party to the contract, is unhappy that it is not entitled to any benefits under the contract.

* * *

In sum, Nationwide has failed to provide any legitimate reason why the Sixth Circuit's decision on purely state law issues provides a basis for granting certiorari. Accordingly, its Petition should be summarily denied.

CONCLUSION

For the foregoing reasons, Nationwide's petition for a writ of certiorari should be denied.

Dated: January 11, 1999
New York, New York

Respectfully submitted,

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